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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

SAN DIEGO LAND AND TOWN COMPANY,
Appellant.
vs.
JAMES A. JASPER, ET AL. (Members of and constituting the Board of Supervisors of the County of San Diego, State of California),
Appellees.

Brief for Appellees.

INTRODUCTORY.

This is an action brought by appellant in the court below to set aside, as unconstitutional, an ordinance passed by the Board of Supervisors of the County of San Diego, State of California, which fixed and regulated the rates

and compensation collectible for the use of water furnished from complainant's system to the inhabitants of the county outside of any municipal corporation.

By its terms, such ordinance went into effect November 16, 1897. Under the law of March 12, 1885 (set forth in the appendix hereto) this ordinance, while in force, limited the maximum of the compensation for water furnished, which the corporation has been permitted to exact.

The particular one of the rates for the several uses fixed by the ordinance which is assailed by the bill, is the irrigation rate of $3.50 per acre per annum. No other rates are objected to.

The ultimate and concrete object which the complainant aims at in its effort to have the ordinance set aside, is to remove the obstruction by the ordinance to the collection from January 1, 1896, up to the present time, and from the present for the future, of an irrigation rate of $7.00 per acre per annum, which the Kansas corporation, the predecessor of complainant in the ownership of the system, and C. D. Lanning, its Receiver, undertook to establish on January 1, 1896. The suit of *Lanning, Receiver*, against *Osborne, et al.*, referred to in the bill of complaint as pending (Record, page 11), was brought to enforce this $7.00 rate. Since the bill herein was filed, the said suit of Lanning passed to a decree in the Circuit Court on December 5, 1898 (76 Fed. Rep., 319).

The decree of the Circuit Court (Record, page 259), contains the following provision:

—"that the said defendants be and they are, and each of them is, hereby required to pay to the complainant said rate of $7.00 per acre per annum for water furnished their lands, as set forth in a bill of complaint herein from and

after the 1st day of January, 1896, *until the fixing and establishing of such rates by the Board of Supervisors of San Diego County, California, or the re-establishment thereof in accordance with law, etc.*"

This decree was affirmed by this Court on March 19, 1900 (*Osborne* vs. *San Diego Land & Town Co.*, 178 U. S., 22).

The proofs here show that the corporation has regularly demanded and collected the ordinance irrigation rate of $3.50 per acre per annum, as well as the domestic rates. (Record, pp. 153, 155, 107, 109, 119-120.)

So that the arrearages of rates in excess of the ordinance irrigation rate of $3.50 already paid, which it is sought to pave the way by this litigation for collecting, is an additional irrigation rate of $3.50 per acre for each year since January 1, 1896; such arrearages claimed up to January 1, 1893, will amount to $24.50 per acre.

This practical aim of the appellant to collect retroactively for seven years a specific increase of acreage rates equal to that already paid under the ordinance, is rightfully to be borne in mind, in weighing the claim made (brief, pp. 20-23) that the court below had no right, and that this Court ought not, to consider the fact (demonstrated by the actual history of the water system since the ordinance), that the shortage of the company's water supply which existed at the time the ordinance was passed, was not relieved during the first year after its passage; and that, on the contrary, the supply was exhausted, even after a famine apportionment (Record, p. 142), long before the end of that first year, and has so remained virtually ever since. And that to secure an insufficient supply of water it has been necessary to resort to wells and pump-

ing; and that for the water so newly developed the consumers have paid the full price fixed by contract in addition to the ordinance rates.

Later we shall dwell upon the fact of this failure and cessation of the water supply to which the ordinance applied, and, upon the bearing of that fact on the value of the system so far "as actually used and useful to the appropriation and furnishing of such water."

Act 1885, Sec. 4.

It seems appropriate here, however, to make the following observations:

After the first establishment of rates on the petition of inhabitants and tax-payers, the rates so established by such an ordinance are binding and conclusive for not less than one year.

Act 1885, Sec. 5.

But, subject to said limitation of one year, at any time after the establishment of such water rates, the rates may be established anew, or abrogated in whole or in part, by the board either on a like petition of inhabitants and tax-payers, *or upon the petition of the corporation.*

Act of 1885, Sec. 6.

Hence the corporation has a remedy for the future, if it is dissatisfied with this ordinance. It has had such remedy available during all the time since November 16, 1898, the date which marked the expiration of the first year after the passage of the ordinance. It has not seen fit to avail itself of the remedy so provided by the statute. (Record, p. 111.)

It may have seemed to the company to be an inopportune time to demand the fixing of rates anew while its

reservoir has been empty, and the water supply *nil*—even though that condition has been chronic for five years last past. So it would seem from the answer of Mr. Savage, the company's engineer, made in December, 1898, as follows: (Record, p. 112.)

"Q. It would be somewhat incongruous, would it not, to ask the board to fix rates for furnishing water you are not in position to furnish at all, would it not?"

"A. *It certainly would look a little peculiar at this time.*"

Unfortunately for all concerned it has continued to "look" so ever since.

The company has therefore preferred to submit to what, it insists, is the intolerable hardship of accepting, for all these years, the full ordinance acreage rates for irrigation, just as though the system had yielded the full supply of 350,000 gallons annually for each acre—cheered only by the sustaining hope, in reserve, of obtaining a decision of the courts ridding it of the ordinance, and so empowering it to collect in addition to the ordinance rates already collected, and the additional special contract rates paid for all water pumped into the system from wells, seven years arrearages of increase of rate for the water it has *not* been able to furnish.

The Circuit Court is severely criticised for dismissing the bill and not forwarding this generous aim. This Court is appealed to, to correct the supposed error of the court below.

We desire in this discussion to hold steadily in view from the beginning the precise nature of the pecuniary results sought to be attained by the appeal. With a clear understanding of that, we venture to think it will not be

difficult to proceed to a righteous and constitutional conclusion.

THE QUESTION PRESENTED BY THE RECORD.

There is but a single question upon the merits, presented in this cause, and that, stated broadly, is whether the rates prescribed by the ordinance attacked by the bill taken as an entirety, are so unreasonable in the constitutional sense as to amount to depriving the appellant of this property without due process of law.

On examination of the estimates, basis and principles upon which the Board of Supervisors proceeded to make its ordinance, the question above stated, resolves and narrows itself down into a single and definite point of inquiry, looking at the question from the Company's standpoint, and disregarding the relation of water-rights to annual rates, to-wit:

Was the valuation of $350,000 placed by the Board upon the property of appellant actually used and useful to the appropriation and furnishing of water from the Sweetwater River for the public use, so unreasonably low as a basis for the statutory net revenue of six per cent. per annum thereon, that such valuation amounted to the taking of the property without due process of law?

This is the only question upon the merits, from the Company's point of view, because:

1. The Board closely followed the procedure prescribed by the statutes, construed as disregarding the water-rights of the consumers; it made an estimate of the value of the property actually used and useful to the appropriation and furnishing of water; it made an estimate of the annual expenses, including the cost of repairs,

management and operation; it fixed rates to yield the statutory net revenue of six per cent. on its estimate of such value. Therefore, the *method* of procedure of the Board, violated no constitutional right of the company.

2. As will be hereinafter submitted, the Board allowed substantially the whole claim of the company for the annual expense of repairs, operation and management; and in so doing *over-estimated* them under the proofs, by allowing items which ought not to have been allowed.

In this, therefore, there was no violation of any constitutional right of the company.

3. And, as hereinafter pointed out, the Board, in making its estimate of the revenue derivable under its proposed ordinance, entirely overlooked the item of domestic rates outside of National City; consequently, in the adjustment and distribution of rates, a greater burden was imposed for irrigation than would otherwise have been done; and of this oversight the company has had the benefit, inasmuch as, under the ordinance, domestic rates were imposed and collected.

In this, therefore, there was no violation of any constitutional right of the company.

Hence the principal question in the case is narrowed down to the question made over the valuation of the appellant's plant actually used and useful, during the life of the ordinance, for the public purposes to which such plant was dedicated.

I.

THE ESTIMATE AND VALUATION PLACED BY THE BOARD OF SUPERVISORS ON THE PROPERTY OF THE COMPANY ACTUALLY USED AND USEFUL FOR FURNISHING WATER UNDER THE ORDINANCE HAS NOT BEEN IMPEACHED ON THE GROUND THAT IT AMOUNTS TO A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is on the grounds above stated only, that the courts will interfere with rates prescribed by public authority.

San Diego Land and Town Co. vs. *National City*, 74 Fed., 79, 83;

San Diego Land and Town Co. vs. *National City*, 174 U. S., 739, 754, 760.

In the former case the Circuit Court said, *ibid*, p. 83:

"It is obvious, I think, that it must be held * * that the Court must adjudicate, when properly called upon to do so, whether the rates established by the municipal authorities *are so manifestly unreasonable as to amount to the taking of property for public use without just compensation*." (Italics ours.)

This doctrine was approved by this Court in the same case on appeal, 174 U. S., 753-4, in the following language:

"It is equally clear that this power" (to fix rates or compensation) "could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago Burlington Railroad* vs. *Chicago*, 166 U. S., 226; *Smyth* vs. *Ames*, 169 U. S., 466, 524. But it should also be remembered that the judiciary ought not to interfere with collection of rates established under leg-

islative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just, both to the owner and to the public; that is, *judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarilly have the effect to deny just compensation for private property taken for public use.*" (Italics ours.)

Cited and approved in *Cutting* vs. *Kansas City Stock Yards* 183 U. S., 79, 90-91.

Has plaintiff made out a case against the valuation by the Board which can, by any stretch, bear this test? We submit that it clearly appears that it has not; moreover, that it appears from the whole evidence that the Board of Supervisors resolved doubts and conflicting evidence rather in favor of the Company than of the public, in its anxiety to do justice to the Company; and further, that if the case had been left where the evidence in behalf of the Company before the Board, left it, there would have been no practicable or reasonable basis upon which it could have fixed rates at all.

A.

FOR THE WHOLE BASIS OF APPELLANT'S EVIDENCE RELATING TO VALUE IS DEFECTIVE, IN THAT IT DOES NOT SHOW THE REAL VALUE OF THE PROPERTY ACTUALLY USED AND USEFUL FOR THE PURPOSES CONTEMPLATED BY THE ORDINANCE; NOR DOES IT SHOW ANYTHING RESPECTING THE EXTENT OR VALUE OF THE SERVICE RENDERED.

The whole basis of evidence on which Appellant submitted its case before the Board, is the tabulated statement

contained in Exhibit 1 introduced by it before the Board, entitled "*Cost of Water System August 1, 1897.*"

Record, p. 282, 543.

The same Exhibit 1 was again introduced in evidence in behalf of the appellant in the Circuit Court.

Record, pp. 127, 129.

It is as follows:

"Cost of Water System, August 1, 1897.

Sweetwater dam		$237,165.05
Sweetwater reservoir lands		159,290.76
Pipe line, National City,	$183,753.90	
Pipe, outside Nat'l. City,	442,797.63	
		$626,551.53
Equipment		3,015.45
		1,026,022.79

The whole of this basis is the alleged cost of the system to the Kansas Corporation. It is the only proof respecting value upon which appellant founded its claim for the statutory rate of net revenue, with an exception hereinafter noted in the testimony of the witness Schuyler, which was identical in the National City case.

This line of evidence before the Board and Circuit Court is of the precise character and quality as that relied upon by the complainant in the case of *San Diego Land and Town Company* vs. *National City*, 174 U. S. 739. That case involved the same water system as does this. There, as here, a similar tabulated statement purporting to be the cost of the system to the Kansas Corporation, was asserted to be the true basis for fixing and judging the rates. There, however, the Kansas Corporation was the plaintiff; here it is the Maine corporation which is the complainant and which has, since the decision of this court in the Na-

tional City case, purchased this water system at foreclosure sale.

As to the like basis, so constructed, for arriving at the value of the system, this court said in the above cited case of *San Diego Land and Town Company* vs. *National City*, 174 U. S., 739, 757:

"The basis of calculation suggested by the appellant is, however, DEFECTIVE in not requiring the real value of the property, and the fair value in themselves of the services rendred, to be taken into consideration."

This language is quoted with approval in *Cutting* vs. *Kansas City Stock Yards Co.*, 183 U. S., 79, 90, *supra*.

Counsel for the appellant not only introduced no other evidence than the cost of construction, but explicitly stated before the Board that the claim for the corporation was that the cost of construction should govern the estimate of value.

Record, pp. 268, 269, 270.

Counsel for the Corporation objected before the Board to any proof of market value, or of the value at which the Maine corporation purchased the property.

Record, p. 456.

The witnesses called before the Board in behalf of the Company based their estimates of value on which the net revenue to be raised should be computed, upon the cost of construction.

Witness Boal, record, p. 341.

Witness Schuyler, record, pp. 311, 322, 323.

And in the evidence given on behalf of appellant before the Examiner of the Circuit Court, the same basis of the cost of construction was assured.

Witness Koebig, record, pp. 218, 219.

That the Company's case as submitted before the Board and before the Circuit Court is based exclusively on the cost of construction, is conceded in the retrospect, in the testimony of Mr. Boal, General Manager, before the Examiner for the Circuit Court, given December 15, 1898, (Record, p. 118), as follows:

"Q The statement referred to, marked Land and Town Company, Exhibit No. 1, contains nothing bearing upon the price paid at the judicial sale pursuant to which the San Diego Land and Town Company of Maine acquired the title to the water system here in question, does it?

A. It does not.

Q. Has your company offered before the Board of Supervisors, or thus far in this investigation, any evidence as to what was paid pursuant to the judicial sale in the case of H. R. Mandell against the San Diego Land and Town Company to foreclose the trust deed made by the San Diego Land and Town Company of Kansas for the water system now in question?

A. *So far as I know, it has offered no evidence except what is furnished by the books of the company, showing the cost of construction of the system.*

Q. This cost of the construction as so shown, and as shown by this Land and Town Company's Exhibit No. 1, was entirely incurred while the Land and Town Company of Kansas was the owner of the property, was it not?

A. *Substantially so.*

Q. Can you state why the San Diego Land and Town Company of Maine has not furnished to the Board of Supervisors any evidence as to what was paid at the said judicial sale for the water system acquired from the San Diego Land and Town Company of Kansas?

A. *The cost of construction has seemed to us—seemed to me—what ought to be presented to the Board;* and further, because the judicial sale was a foreclosure proceeding for the purpose of paying the debts of the old company, and could not be considered as a sale of property in the ordinary sense, and for that reason did not fix the value of the property sold.

Q. Do you mean to say that this property, when it was

offered at judicial sale, was not offered to the world at large and to the highest bidder?

A. It was offered as a whole to the highest bidder.

Q. Do you know why all the property, real and personal, of the San Diego Land and Town Company of Kansas was procured to be ordered sold as an entirety, instead of segregating the lands, the railway, and the railway bonds from the water system?

A. For the purpose of raising money, sufficient to pay off the indebtedness of the old company, as I understand.

Q. Was there any reason why the sales could not have been made of the water system separate from the other property?

A. I know of no reason why that might not have been done; I know of no reason why it should have been done particularly."

Besides this aggregation of figures under heading "Cost of Water System, August 1, 1897," the company offered only this further evidence before the Board, given by its witness Schuyler, as follows:

"Q. You say the plant could be duplicated for about sixty-five or seventy per cent. at that time (February 1895) of the original cost.

A. Yes, sir.

* * * * * * *

B. What could it be duplicated for now?

A. I have not estimated that."

Record, pp. 311, 312.

It is also clear that even the most trustworthy evidence of the original cost of construction of the water system, is, standing by itself, *defective* proof of the value of the services rendered by it; and what comes to very much the same thing, it is defective evidence as to what part of the plant was *used* and *useful* for supplying water to the rate-payers at the time the ordinance was passed and during the time it has remained in force. Of these elements en-

tering into the reasonable value of the service rendered in this case, we shall speak later.

B.

BUT THE AGGREGATION OF FIGURES OFFERED TO SHOW THE COST OF THE SYSTEM, IS IN ITSELF RADICALLY DEFECTIVE EVEN AS PROOF OF FIRST OR ORIGINAL COST TO THE KANSAS CORPORATION.

The method adopted which resulted in this aggregation of figures in complainant's Exhibit 1, is fatally defective as a measure of original cost of construction, together with original cost of extensions of the system. For it appears from the evidence, that this aggregation is made up of everything charged during *ten years* to construction and *reconstruction* on the books of the company. This is shown to have been the general method of keeping and making up that account.

It appears, *for example*, that a large quantity of spiral pipe was laid, which proved worse than useless. Mr. Schuyler, the former engineer of the company, describing it, said it would "answer very well for sub-irrigation."

Record, p. 293.

And he "would not recommend the spiral pipe under any circumstances for any purpose whatever."

Record, p. 294.

Its first cost, laid, was some $58,000.

(Witness Savage, record, p. 125.)

Several attempts were made to repair and use this pipe. (Witness Savage, record, p. 110.) At least two such attempts were made. (Witness Savage, record, p. 125.)

The cost of laying it, and therefore of each relaying, was 65 per cent. of the factory cost, and, as we understand the evidence, was all charged up to construction.

(Witness Boal, record, p. 331.)

Since the cost of this pipe laid was $58,000, and 65 per cent. of the factory cost, was the expense of laying, the sum of $58,000 is made up, proximately, of $35,000 factory cost and $23,000 for laying. Having been twice relaid, the factory cost, the original laying and twice re-laying must have cost upwards of $100,000.

The successive disinterments of this pipe must also have been expensive; and, finally, after all the outlay, the whole of it was condemned, discarded and replaced.

Now, the testimony shows that the aggregate sum given in the Exhibit 1, laid before the board to show cost of construction, includes the expenditure by reason of this spiral pipe and also of the replacements with new pipe.

(Witness Savage, record, pp. 125-126.)

It was not the case of replacements of pipe in the course of ordinary repairs, but the substitution of large, continuous distances of pipe for that which never properly became a part of the system, and most of which never could be made to operate at all.

We quote some of the evidence of Mr. Savage as illustrative of this method of rolling up this account. (Record, pp. 125-127.)

"Q. Do you know what the original cost, laid, was of all this spiral pipe you have mentioned?

"A. As I recall, it was estimated to be between $57,000 and $58,000.

"Q. Now, in this Land and Town Company's Exhibit

No. 1, when the cost of pipe line outside of National City is stated, does that amount given include both the cost of the original spiral pipe and of the replacements?

"A. I believe it does.

"Q. Is the cost of the pipe you have just mentioned included in this estimate?

"A. Of this spiral pipe that was used and found defective and abandoned?

"Q. Your answer may apply to that?

"A. I understand it is. I understand that all of this spiral pipe was included in that statement referred to.

* * * * * *

"Q. If the same method were followed, and if the whole pipe line were to wear out at the rate of six per cent. per annum, and were replaced at the end of the lifetime of the pipe as originally laid, the company would get upon its books the cost of two pipe lines, would it not?

"A. It would, yes, sir; please read the question again.

"Q. (Read.)

"A. Yes, that is right.

"Q. Did you have a personal participation in making out this statement, Land and Town Company's Exhibit No. 1? (Shows witness paper.)

"A. I must have furnished some of the figures contained therein.

* * * * * * * * *

"Q. I mean to ask if, after the original pipe line is worn out, and the first replacement is worn out, and the third pipe line is put in, *and you follow the same method, whether* your books would show the cost of three pipe lines *aggregated?*

"A. They would.

"Q. Did you furnish, or aid in furnishing, to the Board of Supervisors estimates of the cost of the pipe lines based on this method, for the purpose of obtaining six per cent. or any other net revenue upon the *whole amount?*

"A. The statement furnished, as I recall, had provision for depreciation of pipe line, and for an income on the *investment.*

"Q. On the investment as stated in the statement?

"A. Yes, sir.

"Q. And six per cent. upon the *whole aggregated* cost furnished according to this method as an annual demand?

"A. I so understand it."

When this Court speaks of cost of construction as competent evidence bearing on the fair value of the property used and useful for the public, it is careful to limit it in terms to "*original*" cost, not to an aggregation compiled after this method.

San Diego Land Co. vs. *National City*, 174 U. S., 739, 756, quoting from *Smyth* vs. *Ames*, 169 U. S., 466, 546.

As a *sample* illustration of another phase of the defect of this aggregation in Exhibit 1, as a measure of value, we instance the following facts :

That the Kansas corporation flooded 350 acres of the lands of one Neale, with its impounded waters, before it had acquired the title by condemnation or otherwise. A costly litigation ensued. In the course of it the Circuit Court ordered the corporation to draw down the water in the dam to uncover Neal's land, and enjoined it from further flooding it. For the purpose of providing means of keeping the future winter floods from overflowing the Neale lands, the corporation was compelled to contruct a tunnel at an elevation just below that of the Neale land, through the hill at the south end of the dam, and at an expense of $4,700. This was prior to 1891.

That expense was added to *construction*.

(Witness Boal, record, pp. 116-117.)

This sum is included in the aggregate of the Exhibit 1 laid before the Board as the basis of *value* on which to fix rates to yield *six per cent. net revenue*, and also six per

cent. on the asserted cost of the pipe lines and two per cent. on the asserted cost of the dam for a depreciation *sinking fund.* No doubt the cost of the Neale land for the reservoir, $80,000, was very greatly enhanced by this middle-age attempt to take it, ond the resulting litigation. It also went into the cost of the system.

Record, p. 117.

A construction account, kept after this fashion, necessarily grows in a period of ten years (1887-1897) like a snow-ball rolled in deep snow under a gentle thaw; all the original cost in boom times, the cost of discarded pipe which never ought to have been in the system, and of the pipe substituted therefor, the expenditures for trespasses committed by the predecessor in title, the bad bargains, the doubtful matters, are charged to the construction account. It furnished the most convenient receptacle for all odds and ends. This aggregation, unpurged and unchastened was laid before the Board, and is insisted upon by complainant here as the sole basis for estimating the value of this system; and as the basis on which to fix annual rates to yield not less than six per cent. net revenue, and six per cent. depreciation charges on pipe line, and two per cent. on dam, besides all charges for repairs, operation and management.

At this distance of time it is practically impossible for outside parties, and even for the present officers of the corporation, to go through an account kept on this principle and with powers of alimentation so fostered, and find what ought to be excreted to make it trustworthy evidence of original cost, and of the cost of new and permanent additions.

This evidence, then, is radically defective in itself considered, to show *first cost;* or as a basis for a percentage upon which to estimate cost of re-construction; and especially is it defective as held in the National City case, as a *measure of value.*

The asserted cost is an impossible basis for rates.

If the Exhibit 1 were implicitly accepted, as the company insisted, and insists, as the sole basis of value of the system, it would work enormous injustice to the public and would depopulate the territory under the system even more rapidly than has occurred by reason of the drought. Upon this misleading basis it is claimed in the complaint as follows:

"That in order to pay your orator the amount of its annual expenses and an income of six per cent. on the amount actually invested in its water rights and water system up to the date of the passage of the ordinance hereinafter mentioned, it is necessary that such rates for water supplied and consumed be so fixed as to realize to your orator the sum of not less than $120,000."

Record, p. 3.

The Exhibit 1 shows that the highest actual income under the system was for the year 1896, and was a little under $30,000. This was when the irrigation rate of $3.50 per acre per annum originally established by the company, was in force.

The ordinance passed by the Board is substantially the re-enactment of such previous rates established by the corporation. Therefore, the acceptance of this standard of value as a basis upon which to allow six per cent. net revenue would *necessitate* the *quadrupling* of the ordinance

rates throughout, which would make meter rates for domestic uses $1.20 per thousand gallons, and the specific domestic rates, which is the general method of payment, at least proportionately increased, although the ordinance rates for domestic uses are, we think, as high as in any city in the land; and would make irrigation rates $14.00 per acre per annum.

It is apparent that this basis of value was simply an impossible one. Mr. Boal, the general manager, himself admits that any rates for irrigation to yield any such sum would be *out of all reason.*

(Record, p. 344; Ibid, 341-346.)

Even counsel for the company, while claiming that the Board must fix rates by giving six per cent. net revenue on upwards of a million dollars, asserted as the cost of the system in the exhibit, said: "This company does not believe that the consumers could stand any such amount as that."

Record, pp. 344-345.

And yet, the bill as above quoted, alleges that in order to pay expenses and the lowest net revenue the rates should be fixed to yield $120,000 a year.

The object of the company seems to have been to induce the board to fix rates so high as to be impossible, and thus leave the company free to exact within that rate, whatever it saw fit. It is apparent that this would make the statute regulating rates a mere farce.

Record, p. 345.

The question recurs, therefore, did the Board of Supervisors by their ordinance take the property of this corporation without due process of law, because it did not, with-

out any exercise of judgment or discretion, accept the aggregate amount given in Exhibit 1 as the sole evidence of the value of the system?

We submit not so, under the decision of the Supreme Court, because that basis of calculation is "*defective.*"

(174 U. S., 739, 757.)

And because as the manager of the corporation and its counsel were compelled to admit, that basis was practically impossible, and would lead to rates "out of all reason."

C.

THE BASIS OF CALCULATION ADOPTED BY THE EXHIBIT I, CONTAINS NOTHING TO SHOW WHAT THIS WATER SYSTEM COST THE PLAINTIFF, THE MAINE CORPORATION, AT ITS PURCHASE AT JUDICIAL SALE SHORTLY PRIOR TO THE PASSAGE OF THE ORDINANCE; BUT, IS CONFINED TO SHOWING, SUBJECT TO DEFECTS ABOVE POINTED OUT, THE COST OF THE SYSTEM TO THE DEFUNCT KANSAS CORPORATION. THIS RENDERS IT DEFECTIVE AS A BASIS FOR FIXING RATES, AND ESPECIALLY DEFECTIVE AS EVIDENCE TO SHOW THAT THE BASIS OF VALUE ADOPTED BY THE BOARD VIOLATES ANY CONSTITUTIONAL RIGHTS OF PROPERTY.

The above proposition, we submit, was definitely and authoritatively decided by the Supreme Court in the case of *Dow* vs. *Biedelman*, 125 U. S., 680, 690–1. The following language of Mr. Justice Gray in that case, was quoted in the recent case of *St. Louis and San Francisco Railroad Company* vs. *Gill*, 156 U. S., 649, 661–2 as authoritative, and as a caution against courts being "misled into doing grievous wrong to the public." (Ibid., p. 661.)

"The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case, by reason of the admitted fact, that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

All that is exactly apropos, on both facts and law, to this case.

It appears from the bill of complaint (Record, pp.11–12), the admissions of the answer (Record, pp. 26–27), and by other parts of the record, that on the 14th day of April, 1897, in the case of *Mandell* vs. *San Diego Land and Town Company of Kansas*, then pending in the United States Circuit Court for the Southern District of California, a decree was entered (Record, pp. 580-587) for the sale of all the property of the corporation by the Receiver appointed by the Court; and, that pursuant to such decree, after due notice all the property of of the corporation of every kind, real, personal and mixed, was sold on June 14,

1897, to Benjamin P. Cheney and Walter L. Frost at public auction. (Record, pp. 168, 456-458.)

It appears from the record (p. 167) that said Cheney and Frost in making such purchase acted as agents for the present appellant, the San Diego Land and Town Company of Maine, which corporation was organized, as appears by its certificate of organization, under the general laws of Maine on April 20, 1897. (Record, pp. 557–558.)

One of the purposes for which such corporation was formed, as set forth in its said certificate, was, "the purchase of the entire assets and property of a corporation organized and now existing under the laws of the State of Kansas, known as the San Diego Land and Town Company, etc."

Record, p. 557.

The Receiver made to the Court a report of the sale for confirmation, from which it appears that said Cheney and Frost "bid for said estate and assets an amount equal to the lowest price for which said estate and assets were authorized to be sold, offering to pay $889,163.33, the amount fixed by the Court in Section A of Paragraph 1 of the order of the Court herein, dated July 11, 1897, etc."

Record, p. 457.

It appears from a letter signed "B. P. Cheney, President," which was sent to certain dissatisfied stockholders of the Kansas corporation, and which contains the statement that "it is sent pursuant to the action of the Board of Directors at a regular meeting held at the office of the company in Boston, September 14, 1897," that such stockholders of the Kansas corporation petitioned the Court for leave to intervene in the proceedings to resist the confir-

mation of the sale on the alleged grounds, among others that "the said property was purchased at said foreclosure sale by B. P. Cheney, the President and director of said Company, and by Walter L. Frost, a director thereof, *at a price greatly disproportionate to the value thereof.*"

The letter further asserts that "the various matters of law and fact were argued before and considered by the Court, and the Court in its decision rendered through Judge Ross * * * confirmed the sale that had been made, ordered the conveyance of the property and denied your petition for leave to intervene in the proceedings then pending."

Record, pp. 462–467.

The decree of confirmation was entered July 27, 1897, and contains, *inter alia*, the following:

"And it further appearing to the Court that said sale was fairly and equitably had and made and that the interests of all parties concerned in the said estate and assets have been equitably protected therein and thereby, and it therefore appearing to the Court that the bid received for said estate and assets at said sale should be accepted and said sale approved, ratified and confirmed, and that the recommendation of said receiver in said report should be accepted, it is by the Court ordered, adjudged and decreed that the acceptance by said receiver of said bid of said Cheney and Frost as such committee, and the sale of said entire trust estate and assets to said Cheney and Frost as such committee, be, and the same are hereby approved, ratified and confirmed, and that all equities of redemption in or to said trust estate and assets, or any part thereof, are hereby declared to be forever barred of recovery and foreclosed. And the said receiver is hereby authorized and ordered upon proper payment, to execute proper deeds and conveyances, transfering and conveying to said Cheney and Frost, as such committee, or to such person, persons, or corporation as said Cheney and Frost, as such commit-

tee, may designate by requesting in writing, duly acknowledged and filed in the record of this cause, said entire trust estate and assets."

Record, p. 460.

The conveyance was accordingly made by Lanning as receiver to the appellant here August 1, 1897. (Record, 170.)

The ordinance in question was adopted October 16, 1897; therefore, practically contemporaneously with the fixing by the Circuit Court of an upset price for the sale of all the assets of the corporation, including the water system (Par. xi, decree of foreclosure, record, p. 585); and with the sale, the contest over the confirmation of the sale and the confirmation of such sale.

Counsel strive to distinguish *Dow* vs. *Biedelman* from this case on the ground that that was a *railroad* and this a *water system*. (Brief, p. 31.) But the actual value of the property and of the service rendered, form the basis of rates for net revenue alike for railways and water systems, where under the latter the question is not implicated with water-rights in the system acquired by the consumer. This was expressly decided in *San Diego Land Company* vs. *National City*, 174 U. S., 739, 754-5. Nor does the statute of 1885 depart in any degree from the principles laid down by this Court for determining the basis for net revenue, in cases where no contract rights are involved.

Counsel claim that in the case of *Dow* vs. *Biedelman*, 125 U. S., 680, the language of the court is to be explained away as holding, among the other things, that there was no proof of the cost of the roads. (Brief, p. 31.) We do not appreciate the utility of thus blinking the plain record, which shows that the *original cost* of the road was

found by the trial court in that case in accordance with an agreed statement of facts in the case. (Ibid., pp. 682-4.) Facts so found in the court below are conclusively accepted by the appellate court when the case comes up on writ of error. And what the court there decided, which applies here, is that even the *conclusive* finding of the *original cost* of a *quasi* public improvement to the corporation that has been superseded by a reorganized corporation which acquires the property at a foreclosure sale, furnishes of itself no means of determining that a rate fixed by public authority is unreasonable. And that from such proof "*still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.*"

(*Dow* vs. *Biedelman*, *ubi supra*, p. 691.)

And this language of the Supreme Court is of even more emphatic application where the aggregate figures offered to show cost, confessedly are the result of ten years' accumulation of the character, as shown by the testimony as above pointed out.

On the face of it, there is a curious air of inconsistency here, in the plaint that this corporation is, by this ordinance, deprived of its property without due process of law, because the board fixed rates to yield to this corporation six per cent. net revenue on a valuation much greater than the price at which it had just acquired the identical property from the other corporation at judicial sale. Do counsel then mean to contend that their client, the Maine corporation, deprived the Kansas corporation of *its* property without due process of law?

The Circuit Court heard a very different contention from the learned counsel when dissatisfied stockholders of

the Kansas corporation opposed the confirmation of that foreclosure sale, in the proceeding in which the receiver was appointed.

Record, p. 460.

As above stated, the sale, as shown by the evidence before the board and before the Circuit Court, was confirmed.

Does it not savor somewhat of remoteness to refer this constitutional contention to the dead past of the Kansas corporation, rather than to the present "investment" (to use the term employed by Mr. Justice Gray in the entirely similar relation in the case above cited) of the Maine corporation in the property for the use of which rates were fixed?

Which is the better evidence of present value—the price paid at the then recent judicial sale in behalf of the complainant, which by its trustees then for the first time came into this State to do business—made at public auction after the full notice required by the decree—a sale which was not only made under judicial safeguards, but was afterwards investigated by the machinery of the Circuit Court and approved and confirmed after contest as being for an adequate and equitable price; or, the accumulated aggregation of cost of construction, of reconstruction, trespasses, and the like, which mark the history of the Kansas corporation for ten years previous to the sale?

The case of *Dow* vs. *Biedelman*, *supra*, holds that the former is the better, nay *indispensable* evidence; and the case of *San Diego Land Company* vs. *National City*, 174 U. S., 739, 757, holds the latter "defective," even though it had showed, as it does not, the *original* cost.

Is the Board of Supervisors chargeable with invasion

of the constitutional rights of property because they may have given, and apparently did give, weight to the former class of evidence, although without disregarding the latter?

We respectfully submit not so.

D.

THE TEST BY MARKET VALUE OF BONDS AND STOCKS OF THE KANSAS CORPORATION AT THE TIME THE MAINE CORPORATION ACQUIRED THE SYSTEM, SHOWS THAT THE ESTIMATE OF VALUE MADE BY THE BOARD IS MOST FAVORABLE TO COMPLAINANT.

But there is something more to be said in favor of giving preponderating weight to the evidence of the price paid by the Maine corporation, or its trustees, for this property at the foreclosure sale, as the more reliable evidence of the value of the water system.

One of the elements of proof of the market value of such property is stated in *Smyth* vs. *Ames*, 169 U. S., 466, 546-7; and, is expressly re-affirmed in *San Diego Land and Town Company* vs. *National City*, 174 U. S., 739, 756, and in *Cutting* vs. *Kansas City Stock Yards Co.*, 183 U. S., 79, 89, to be:

"*The market value of its bonds and stocks.*"

The market value of the bonded debt of the Kansas corporation, a proper test of value of its assets, including its water system, when sold. And by this cost the value of such assets did not exceed the price realized.

On the subject of the market value of the bonds of the

Kansas corporation at the time the Maine corporation bought the assets of the former, we have the testimony of Charles D. Lanning, who was treasurer of the Kansas corporation from April, 1894, also receiver of that company from September, 1895, to the latter part of 1897, and who has been vice-president and treasurer of the Maine corporation since its organization. The articles of the Maine corporation were adopted April 20th, 1897, approved by the attorney-general of Maine on that date, filed in the office of the secretary of state of Maine, April 26th, 1897, and filed in this state September 16th, 1897.

Record, pp. 156, 158-163, 166-172, 241-244, 557-559.

It appears from this evidence that on March 1st, 1895, the bonded debt of the corporation, secured by what the witness calls a "general" mortgage (Record, p. 158) dated Feb. 1, 1890 (Record, p. 582), outstanding, was $500,000, drawing seven per cent. per annum. On this date (March 1, 1895) the corporation had some outstanding floating indebtedness, which at a later stage of its history, and at the time the receiver was appointed, Sept. 4, 1895, appears to have amounted to about $150,000.

Record, pp. 159, 160.

To provide means for taking this up, and to eventually take up the $500,000 first mortgage bonds, a second general mortgage (Record, p. 158) dated March 1, 1895, was executed by the corporation to secure a new issue of its six per cent. bonds, not to exceed a possible sum of $1,000,000 (Record, p. 243); but bonds for only $250,000 thereof were executed or issued.

Record, pp. 242, 583.

The corporation first offered to sell this second proposed issue of bonds to its stockholders at 92½ per cent. of their

par value. *But only one bond for $500* of the whole issue could be sold to any of the stockholders.

Record, pp. 158-159, 242-243.

Efforts were also made through various banking connections of the company in New York and Boston to sell this issue, from just prior to the execution of the bonds until the receiver was appointed in September, 1895, but without any success whatever.

Record, pp. 159, 242-243.

Then all of the $250,000 issue, except the one bond for $500.00 sold, was pledged to B. P. Cheney, a large stockholder, and to others, as collateral security to the floating indebtedness of $150,000, outstanding, as above mentioned, when the proceeding for appointment of the receiver was had.

Record, pp. 159, 243.

Afterward, under what was termed a plan of re-organization, an amicable suit was instituted against the corporation by two small stockholders; this was acquiesced in by the company, and Lanning was appointed receiver, and B. P. Cheney was made president of the company.

Record, pp. 158, 156, 160.

At the same time a plan was formulated under which between 70 and 80 per cent. of the stockholders came into an arrangement pursuant to which they contributed to a fund of $900,000 less an *underwriting* commission of 2½ per cent., or a net sum of $877,500, with which to organize the Maine corporation and buy in the whole property of the Kansas corporation.

Record, pp. 161-163, 166-167.

No part of this money, however, was used directly in making the purchase at the receiver's sale on foreclosure. It appears that the receiver took up the bonds issued under the second mortgage, which had been pledged to Cheney and others as collateral, with the proceeds of the sale of receiver's certificate issued under the orders of the court (record, p. 166) and this was done, as explained by Mr. Lanning, because "*nothing could be sold except a prior lien upon the property at the time; and for that reason the receiver's certificates were authorized.*" (Record, p. 242.)

And a second time he states that the issuance of receiver's certificates became necessary, because the mortgage bonds could not be sold.

Record, pp. 242-3.

Up to this time the whole outstanding prior and permanent liens upon the property were the $500,000 bonds secured by the trust deed of Feb. 1, 1890, and $500 by the trust deed of March 1, 1895.

Record, pp. 159, 241.

It also appears that at the foreclosure sale by the receiver "*the payment of the entire amount of the purchase price was made in the outstanding bonds of the company, including the coupons and the outstanding receiver's certificates, all of which had passed by purchase into the hands of the re-organization committee of stockholders.*"

Record, pp. 162, 163.

The purchase of the outstanding obligations of the company and of any receiver's certificates that might be issued, and the use of them at an anticipated judicial sale of all the property of the company, to buy the same in for

the benefit of a new proposed corporation, was contained in the plan of re-organization promulgated December 9, 1895.

Record, p. 552.

It also appears that this purchase of all the outstanding obligations of the Kansas corporation did not absorb all of the $877,500 remaining of the subscribed sum of $900,000 after the deduction of the underwriter's commission of 2½ per cent. (Record, p. 162); because, "certain of the outstanding bonds were acquired by the re-organization committee of stockholders, on behalf of those who joined in the re-organization, *at a discount from their par value.*

Record, p. 169.

This discount, it appears from the letter of B. P. Cheney, Jr.,dated September 16, 1897 (Record, p. 467) the correctness of the statements in which are sworn to by Mr. Lanning (Record, p. 171) to be "*five per cent. of their par value with accrued interest;*" and this would seem from the letter to apply to all the bonds outstanding, to-wit, $500,000 secured by trust deed of Feb. 1, 1890, and the $500 bond under trust deed of March 1, 1895.

Record, pp. 159, 582, 583.

It thus appears that the whole, of even the *first mortgage* bond issue of $500,000, as well as the second mortgage bond of $500, were bought up *in the market at a discount of five per cent.* Also, that every liability of the corporation existing when the receiver was appointed, and including the receiver's certificates issued during the pendency of the cause and made first lien, had been acquired by this re-organization committee, *in the open market*, for less than said sum of $877,500, *i. e.*, for at least as much less as the whole five per cent. discount on the

bonded debt, which upon the principal would amount to $25,025.

The par or face value of all these securities on the whole property of the company reckoned to the day of the foreclosure sale, was, as shown by the accepted bid, paid by the surrender of these obligations, $889,163.33; and the interest on them, together with the operating expenses from June 14th, 1897, to August 1st, 1897, the date of the actual conveyance under the sale, to the Maine corporation, carried the *nominal* amount of the aggregate selling price of the whole property of the corporation, real and personal, including water system, railway, railway bonds, improved and unimproved lands, town lots, choses in action, etc., to $914,000. (Record, p. 169.)

But all this, as already stated, was paid for in the obligations of the corporation secured on all its property bought up in the open market for less than $877,500—how much less is not fully disclosed; but the discount was at least five per cent. on the principal of the bonds—$25,025.

We submit that the foregoing history of the bonded debt of the Kansas corporation, brought down as it is to the date of the receiver's foreclosure sale, furnishes satisfactory proof of the market value of such bonds. As early as December 9, 1895, the "Re-organization Committee" announced to the stockholders that "as part of this plan all outstanding bonds of the company will be retired by purchase thereof by the committee at 95 per cent. of their par value."

(Record, p. 549.)

And what was thus declared feasible in December, 1895,

was accomplished by June 14, 1897. The amount of this outstanding bonded indebtedness in September, 1895, when the receiver was appointed, was, as already shown, as follows:

Seven per cent. bonds of 1890 sold	$500,000
Six per cent. bonds of 1895 sold	500
Indebtedness contracted upon the collateral security of the remainder of $250,000 issue of bonds of 1895	150,000
Total	$650,500

These bonds, both those sold and those held as collateral, as already shown, were scattered among various financial institutions and other investors of New York and Boston. Not only did the $500,000 of first mortgage bonds thus stand for about two years, at five per cent. below par, but it was found impossible to sell any of the second issue, though offered at 92½ per cent. of their par value to the stockholders, except a single $500 bond; and no sale whatever could be found for any more of such second issue in the general market; but the best that could be done with the remainder of that issue was to obtain a loan upon them of $150,000.

It further appears from the foregoing history that during the receivership it was found necessary to issue under the orders of the court, receiver's certificates to take up the $150,000 indebtedness, for which this second issue of bonds was so held as collateral, and make them a lien *prior* to the first mortgage bonds on all the assets of the corporation, in order to procure buyers for them.

Plainly here was a test of the market value of the bonds,

first by the stockholders; next by financial institutions in New York and Boston, the money-centers of the country; and finally by the order of the court itself in displacing the first mortgage bonds and making it possible to sell receiver's certificates making a first lien on the whole property.

The test seems ample and sufficient; and by it $500,-500 of bonds, secured by the two general mortgages on the assets of the corporation, were found to be worth no more than 95 per cent. of their face; and it was demonstrated that the additional sum of $250,000 of second mortgage bonds would support no more than $150,000 of a loan.

Thus the value of all the assets of the corporation, tested by the market value of all the bonded debt which it would carry up to the date of the sale, was not worth more in round numbers than $625,000. These bonds, so far as not replaced by the receiver's certificates, were turned in upon the purchase price at the receiver's sale for their full face value; and, together with the receiver's certificates, made the amount of said price.

In view of the proofs as to the market value of the bonds, we submit that the nominal price bid in behalf of the Maine corporation at the receiver's sale exceeded the value of all the assets of the corporation.

Any other contention on the part of appellant is self-accusatory.

Indeed, any other contention on the part of the organizers of the Maine corporation is self-condemnatory; for the record shows that the four members of the "re-organ-

ization committee," to-wit: B. P. Cheney, Edward H. Mason, Charles W. Shattuck and Walter L. Frost were directors of the Kansas corporation while engaged as such committee.

Record, pp. 545-555, 160.

Mr. B. P. Cheney was the chairman of this committee. He was also the president of the Kansas corporation and he became president of the Maine corporation. (Record, pp. 244, 462.)

The receiver Lanning was, during his receivership, the treasurer of the Kansas corporation; he is a director and the vice-president and treasurer of the Maine corporation.

Under these circumstances the thought will not readily be entertained that the directors of the Kansas corporation speculated in either the obligations or property of that corporation, by buying such obligations or property below the market value, for the benefit of the new corporation organized by them under the laws of Maine.

Indeed, as we understand the record upon the contest of the confirmation of the sale by the disputing and dissatisfied stockholders of the Kansas corporation, the decision of the Circuit Court absolved the agents of appellant from such charges.

2. *Tested by the market value of the stock of the Kansas corporation the value of the assets of that corporation when purchased at the foreclosure sale did not exceed the purchase price.*

The stock of the Kansas corporation was worthless as it stood prior to and at the time of the foreclosure sale, because its indebtedness fully equaled the value of all the assets of the corporation and swallowed up such assets at the foreclosure sale.

Mr. Lanning admits that since the organization of the Maine corporation, April 20, 1897 (Record, p. 557), the stock of the Kansas corporation had no market value.

Record, p. 170.

Therefore, by the test of the market value of its stock, the assets of the Kansas corporation were worth no more than its debts, or what is the same thing, the price realized at the foreclosure sale.

3. The stock of the Maine corporation was worth no more than the fund contributed by its promoters to buy the entire assets of the Kansas corporation at the foreclosure sale.

The appellant, from its organization up to the foreclosure purchase, had no property but the fund contributed by its promoters to acquire the assets of the Kansas corporation at the judicial sale, to-wit: $900,000 less the underwriters' commission of 2½ per cent., *i. e.*, $877,500. (Record, pp. 162, 169-170.)

It had nothing afterward upon which it issued its stock, except the property of the Kansas corporation so bought, and the surplus of that fund not used to buy in at a discount the obligations of that corporation with which it paid the purchase price.

Record, pp. 169-170.

By no possibility did its whole assets exceed its net capital of $877,500. It, however, issued $900,000 of preferred stock and $2,250,000 of common stock upon these assets, although there was no material change in the value of the property purchased at the Receiver's sale, between the time of the conveyance and the time when the stock was issued. (Record, p. 170.) What was the common stock

worth? Nothing but as counters to gamble with. No sane man, knowing the facts, would buy any of the common stock upon any other basis.

Measured by its value, the preferred stock was worth no more than the property against which it was issued, cost the Maine corporation, which was considerably less than $900,000.

E.

THE OPINION OF THE OFFICERS OF COMPLAINANT CONCERNING THE VALUE OF THE PROPERTY AMPLY SUPPORTS THE VALUATION PLACED BY THE BOARD UPON THE WATER SYSTEM OF APPELLANT.

But we are not left to our own unaided conclusions from the evidence as to whether the price paid by the Maine corporation is a fair standard of the actual value of the entire property, including the water system, at the time of the foreclosure sale June 14, 1897. For there is in evidence the studied and deliberate conclusion upon that subject contained in a letter formulated by the Board of Directors of the Kansas corporation on September 14, 1897, aided by Mr. Lanning who was then the Secretary and Treasurer of the Maine corporation. At this time B. P. Cheney was the President of both the Maine and the Kansas corporations; Cheney, Frost, Shattuck and Mason were at the same time directors of the Kansas corporation, and represented the promoters of the Maine corporation, and Cheney, Frost and Shattuck constituted the majority of the incorporators of the Maine corporation. (Record, pp. 160, 462, 557–558.) In other words, the governing bodies of both corporations were substantially indentical.

The object of the letter was to justify to a minority of

the stockholders (being from twenty to thirty per cent.) of the Kansas corporation, the purchase made by the Maine corporation, or its agents, at the foreclosure sale of all the assets of the former, in respect of the fairness of the sale and the adequacy of the price paid. This letter was put in evidence before the Board of Supervisors; and Mr. Lanning testified before the Examiner of the Circuit Court that the statements contained in the letter were true. (Record, pp. 171, 172.)

The pertinent passages are as follows (Record, p. 467):

"In pursuance of that plan of reorganization, the property was finally sold on June 14, 1897, for a price which was greater than the market value of all its securities for a year or more prior to its passing into the hands of a Receiver, and it is absolutely beyond doubt that the price obtained for the property was greater than could be obtained for it by sale in any other manner."

And again, after stating that the bonds were bought in at five per cent. discount (Record, p. 467), it is said, near the bottom of the same page:

"A price was paid for the property greater than could possibly be obtained for it in any other way."

This is what is testified to as being the truthful answer to the charge made by the minority of the stockholders of the Kansas corporation, referred to in the letter, "that the said property was purchased at said foreclosure sale * * * at a price greatly disproportionate to the value thereof."

Record, p. 463.

All this was stated one month before the enactment of the ordinance in question. Mr. Lanning testifies that there was no material change in the value of the property from the time of the sale in June until the date of the conveyances to the Maine corporation August 1, 1897, and

the issuing of its stock in December 1897. (Record, p. 170.)

An effort was made on the part of the counsel for the appellant to break the force of these emphatic statements made "pursuant to the action of the Board of Directors at a regular meeting" (Record, p. 467), by certain questions put to Mr. Lanning. It does not appear that Mr. Lanning was, at the date of the letter, or ever had been, a director of the Kansas corporation. At this date (September 16, 1897) he was the Receiver of the Company (Record, p. 156). Therefore, although he seems to have assisted in preparing the letter (Record, pp. 170–171), he was hardly competent to explain away the declarations of the directors. But his answer to the following question confirms the plain statements in the letter:

"Q. Did you mean to be understood by that statement that the price at which the directors or the committee bought in the property was its actual value?

A. * * * The statement to them of the actual value of the property of course was meant to have reference to the peculiar circumstances existing at the time of the sale—the well-known general depreciation and the general conditions of values, that made the sale of any such property, *indeed of any property*, a matter of great difficulty * * *."

(Record, p. 171. Italics ours.)

Summary of considerations going to show that the price for the property of the Kansas corporation paid at the Judicial Sale of June 14, 1897, was the most trustworthy and contemporaneous measure of its true value at the date of the Ordinance, October 16, 1897.

Regard then being had to the foregoing considerations, to-wit:

The true price paid for the water system at the purchase upon foreclosure sale, June 14, 1897.

The fact that such sale was made, reported and its confirmation recommended by Lanning, then the Receiver of the Kansas Corporation and later Vice-President and Treasurer of appellant.

The fact that after a contest against the confirmation, on part of the stockholders of the Kansas corporation who did not join in organizing the Maine corporation, the objections to confirmation on the ground of unfairness of the sale and inadequacy of price, were overruled by the Circuit Court and the sale confirmed July 27, 1897.

The fact that the bonded debt and other liens constituted the whole purchase price at the foreclosure sale, and that such bonded debt for a long time had stood in the market below, and was actually bought up in the market for less than it was turned in at upon the purchase price at such sale.

The fact that the stock of the Kansas corporation was worthless, and that of the Maine corporation worth no more than the money paid in to buy the property of the Kansas corporation.

The fact that under date of September 14, 1897, the President, Vice-President and Treasurer and the representatives of the promoters of the Maine corporation, appellant, united in the deliberate justification of the price paid at the foreclosure sale, as being greater than could be obtained by sale in any other way.

And the fact that this test of the value occurred almost contemporaneously with the passage of the ordinance and valuation made by the Board of Supervisors on October 16, 1897, and that there was no change in the value of the

property between the date of the foreclosure sale and the passage of the ordinance,—all the foregoing facts when considered with the sole evidence of value offered on the part of appellant, to-wit: the construction account of the Kansas corporation, with all its accumulations and defects, we respectfully submit, show that after giving due weight to the evidence introduced for the Company, the true price paid for this water system at the foreclosure sale, represented by the value of the bonds and claims with which the price was paid, constitutes the most direct, trustworthy and contemporaneous measure of the true value of the whole property of the Kansas corporation, including the water system here in question; and that such measure of value, is best supported by the evidence; and that under the cases of *Dow* vs. *Biedelman*, 125 U. S., 680, 690-1; *St. Louis & San Francisco Railway* vs. *Gill*, 156 U. S., 649, 661-2; and *San Diego Land Company* vs. *National City*, 174 U. S., 739, such price constitutes the most authoritative and, indeed, indispensable proof in this record, of the value of the system under the conditions as existing and as forecast at the time this ordinance was passed.

We shall then confidently assume that the Board ought to have given great weight to the proof of the price paid by, or in behalf of, the Maine corporation for this water system at the foreclosure sale in arriving at its value.

The price paid for the water system was implicated with the price paid for the whole assets of the Kansas corporation, since the decree of foreclosure directed the sale of the property to be made as an entirety.

We therefore pursue the inquiry as to whether upon the basis of the price paid for all the assets of the Kansas corporation, the Board took the fair proportion of that price

as an element in its estimate of the value of the water system.

F.

UNDER THE PROOFS, THE ESTIMATE OF THE VALUE OF THE WATER SYSTEM BY THE BOARD OF SUPERVISORS AT $350,000, EXCEEDS THE DUE PROPORTION OF THE PRICE AT THE FORECLOSURE SALE ATTRIBUTABLE TO THE WATER SYSTEM, BY AT LEAST $125,000.

The fact has already been referred to that the promoters of the Maine corporation obtained a provision in the decree of foreclosure upon the liens which they had acquired against the property of the Kansas corporation, that the entire property of such corporation, real, personal and mixed, should "be sold by said receiver as an entirety at public auction"—for the purpose of effecting such foreclosure and of raising funds to pay and discharge all claims against such estate.

Decree of Foreclosure, par. 10, Record, p. 584.

A list of the entire assets as they stood December 31, 1894, is shown in the directors' report of that date.

Record, pp. 578, 579.

A statement somewhat more summarized of such assets as they stood September 4, 1895, is found in the re-organization plan and agreement under date of December 9, 1895.

Record, p. 547.

The items of assets at the date of the sale June 14, 1897, remained substantially the same as they were December 31, 1894, as shown in the directors' report. Pages 578, 579, of the Record, *supra*; witness Boal, Record, p. 526.

We are not concerned with the reasons for this provision for the sale as an entirety, but only with the fact, and that it was by the procurement of the promoters of the appellant corporation. In the evidence, both that introduced before the board and before the Circuit Court, the appellant ignored the whole matter of what it paid for the water system at the foreclosure sale. Consequently no aid has been afforded at any time by the appellant toward the ascertainment of what proportion of the price paid by it for the entire property is referable to the water system; nor has it furnished any evidence to militate against that otherwise produced upon that subject.

The board, however, as shown by "findings" (Record, p. 73) put in evidence by complainant, "after a careful consideration *of all the testimony* regarding the value of the water plant of the San Diego Land and Town Company of Maine, including the amount at which the entire property had recently been sold, to-wit: $889,163.33, and the proportionate value of the said plant to the whole property sold, and the amount at which said plant had been carried upon the assessment rolls of the county for the past eight years, to-wit: $155,000," estimated and determined the value of the plant to be $350,000.

There were three lines of evidence offered before the board, which furnished some basis for ascertaining the ratio of value of the water system to the value of whole property sold; to these the board was compelled to resort, in default of any aid from the company, in order to find what this system cost complainant and what was the value of the water system as determined by the sale.

Those lines were:

1st. Comparison of assessed valuations of water system for a series of years, with those of the whole real property.

2d. Comparison of taxes paid on water system, with amount of taxes paid on the whole property, real and personal, during a series of years.

3d. Comparison of valuations last put by the fiscal officers of the Kansas Corporation, December 31, 1894, upon the water system, with their valuations of the whole property taking into consideration improvements to the various parts of the property made since that date.

Before the Circuit Court there was in addition:

4th. The studied estimate of a competent witness, Copeland.

Record, p. 245.

5th. Comparisons of valuation of water system, with valuation of the entire property as contained in the reorganization circular put in evidence by appellant. (Record, p. 547.)

As to the assessed valuation upon the water system of $155,000 it is self-evident that, while the board did not refuse to consider it with other testimony, it did not treat it, as in and of itself, proof of value; else it could not have, notwithstanding, made its estimate $350,000, or two and a fourth times the assessed value.

The board evidently did not consider the amount at which this property was carried upon the assessment rolls of the county, for any other purpose, than as some aid, from a disinterested source, toward finding the ratio between the value of the water system and the value of all the real estate of the corporation. It was for this purpose

of comparison that the assessments were introduced, and for none other.

Record, p. 533.

For that purpose such evidence was necessary and proper.

What, then, do these various methods of getting at "the sum invested by the re-organized corporation or its trustees", without proof of which this Court says: "the Court has no means of determining that this ordinance is unreasonable" (125 U. S., 690-1) show?

1. The assessed values of the water system as compared with the assessed value of the whole real estate, not including the railway bonds and personal property, was for several years as follows: (Record, p. 533.)

For the year 1897,	as $155,000 is to	$722,996.
" " "	1896, as $155,000 is to	$767,819.
" " "	1895, as $143,000 is to	$806,074.
" " "	1894, as $143,000 is to	$714,134.
" " "	1893, as $143,000 is to	$764,014.
Total for 5 years, - -	$739,000	$3,775,037.

Thus the average proportion for the named years, of the assessed value of the water system, to assessed value of all real property, including the water system, was little over 20 per cent.

It is apparent that, judged by this standard of comparison, the board did not err against the corporation in assigning to the water system $350,000 of the cost to it of all the property bought at the foreclosure sale, less than $900,000, *i. e.*, about 40 per cent. of the whole cost.

2. Again, by combining the taxes paid on the water

system as shown on the company's Exhibit I, before the board (Record, pp. 128-9), in a comparative table with the taxes on all the corporate property (Record, pp. 525, 540), the evidence shows the following:

	TAX ON WATER SYSTEM.	TAX ON WHOLE PROPERTY.
For 1897 to Aug. 1,	$1,635.33	$6,664.97
1896 " "	3,444.20	17,321.06
1895 " "	3,046.34	19,352.44
1894 " "	2,801.16	22,273.47
1893 " "	3,494.63	26,698.07
1892 " "	2,250.98	19,021.82
1891 " "	2,511.09	10,783.38
1890 " "	4,303.19	21,341.96
1899 " "	5,456.72	23,971.52
1888 " "	3,441.67	20,298.78
	$32.385,31	$237,726.77

Thus it appears that for ten years the water system paid upon the average 17 per cent. of the amount of taxes paid on the whole property, real and personal, including the water system.

3. By the appraisement of all the assets of the Kansas corporation (the same as sold at foreclosure sale), made in the National City office, as contained in the sixth annual report of the board of directors to the stockholders December 31, 1894, pp. 14, 16, in evidence as "Exhibit L" before the board (Record, pp. 578, 579), the following valuations, which were made on the same basis and were "comparative."

Witness Boal, Record, p. 577.

WATER SYSTEM.		TOTAL OF ALL PROPERTY, INCLUDING WATER SYSTEM.
Sweetwater dam	$334,080.91	
Pipe line (1)	544,154.72	
Pipe line (2)	948.28	
	$889,183.91	$3,277,953.96
Since Dec. 1894, some additions were made to pipe line and dam at cost of not to exceed $82,000.00, (Record, p. 365)		82,000.00
605¼ acres of the land were improved and doubled in value. (Record, p. 363.) This value on basis of the appraisement (Record, p. 364), was $300.00 per acre, making the amount in round numbers		180,000.00
The Railway was also largely improved, but the witness does not give the expenditure. (Record, p. 372.) It must have been large. On this basis of valuation for the purposes of the comparison (Mr. Boal admits the general depreciation, Record, pp. 366, 373), the ratio of values of the water system to that of the whole, would stand by reason of the lack of figures as to the railway, lower than as $971,183.91 is to		$3,539,953.96

That is, less than 28 per cent.

4. This percentage coincides with the testimony of the witness Copeland, as the result of his examination of this report. (Record, p. 246.)

And his estimate is, that in June, 1897, the proportionate value of the water system as a whole to the total value of all the assets bought at the foreclosure sale, including

the railway, the railway bonds, lands, town lots and personal property of the Kansas corporation, was 25 per cent. Record, p. 245.

Taking all these tests together it appears that such ratio was not properly over twenty-five per cent.; this per cent. of the cost of the whole at the foreclosure sale (less than $900,000), would make the actual investment in this water system by this corporation, not over $225,000, which is less than the $250,000 alleged in the answer.

But the Board's estimate on which the six per cent. rate of net income was allowed, was $350,000.

Certainly, the Board gave weight to some other evidence than what the system cost this company, in favor of the company, to the extent of $125,000.

The appellant's manager, Boal, admits the general depreciation from the original cost and valuations of all of this property, including the water system. (Record, p. 373.)

But the Company confined its proof of value to the construction account of the defunct Kansas corporation, substantially as contained in the above list made by the Board of Directors, *and gave not a particle of evidence of how much such depreciation in value is*, except the speculative evidence of the percentage of deterioration of the dam and pipe lines. The utter unreliability of this speculative, opinion evidence, is illustrated by the consideration that if the asserted deterioration of the pipe lines, were as claimed, six per cent. for each year since January 1st, 1888, it would have deteriorated up to January 1, 1903, *Ninety* per cent., notwithstanding all the current repairs paid for out

of the income; and consequently would now be worth only 10 per cent. of its cost to the Kansas corporation, if that be taken, as counsel insists it should be, as the basis of the measure of value.

In this condition of the proofs can the Board be properly or even decently charged with putting an unreasonable valuation on this plant in placing such valuation at $350,000, which, as above shown, is $125,000 more than appellant had just paid for it? We submit not, and borrow again the language of Mr. Justice Gray in *Dow* vs. *Biedelman*, 125 U. S., 680, 691:

"Still less does it appear that there had been any such confiscation as amounts to taking property without due process of law."

But counsel for appellant insists, brief, p. 28:

"That the price at which the property was sold cannot properly be taken as representing or fixing its real value."

And appellant has all along protested against any consideration of this price as competent evidence of value.

We ask why not? The appellant's answer is that inasmuch as this was a foreclosure sale under a decree of the Circuit Court for the payment of the mortgage and other secured indebtedness of the corporation, to a new corporation formed by a part of the stockholders of the old corporation, it somehow differed from an ordinary sale under a decree of a court; and that "it was the same result that would have followed if an assessment had been regularly levied against his stock and the stock sold for its non-payment." (Brief, p. 29.)

But we submit not so.

It is true that the sale of a shareholder's stock upon a delinquent assessment, would oust him of any interest in

the assets of the corporation; and also that he would be cut off from any interest in such assets, by the sale thereof under a decree of foreclosure. But in the former case the corporation would retain title to its assets; in the latter it would not. In the former case it would only be the delinquent shares that would be sold; in the latter it would be the assets themselves. In case of a sale of the stock of the Kansas corporation nothing could have been realized, because its debts equaled the value of its assets. But upon the foreclosure sale of all the property upon a decree which established the debts as prior liens, the assets brought what must conclusively be presumed to be their full value.

The Maine corporation is in all respects perfectly distinct from the Kansas corporation, and stood, when bidding at the foreclosure sale, upon a precisely equal footing with the world of bidders. It is inconsistent and inadmissible to argue that, because of the character of its shareholders, it bought the property of the old corporation below its market value, and was somehow shown a favoritism by the law at the expense of the minority of the shareholders whom its bid and purchase cut off from all interest in the property.

The following is laid down in Thompson's Commentaries on Corporations:

"Sec. 261. *Effect of Re-organization after Mortgage Foreclosure.*

"The valid foreclosure of a mortgage upon all property and franchises of a corporation, *cuts off absolutely the rights of the stockholders.* Thereafter they can have no rights in the reorganized corporation, except such as are secured to them, if any, by the decree of foreclosure, or by voluntary arrangements among the parties in interest.

* * * * * * * * *

"Where the purchasers of the property of a railroad corporation under the statutes of New York at a foreclosure sale re-organize the corporation, they thereby form a *new* and *entirely distinct corporation* from the old company. The right to be a corporation not being the subject of mortgage, did not pass by the sale, but is obtained by direct grant from the State on filing the new certificates of incorporation." (Italics the author's.)

This text is amply sustained by cases cited in its support. Certainly, this Maine corporation is a new and entirely distinct corporation from the Kansas corporation.

In what character did this Maine organization of those who had been stockholders of the Kansas corporation buy this property? As stockholders of the Kansas corporation? Not at all, because the foreclosure cut off their rights as stockholders of that corporation. It just as much cut off the rights of the majority who formed the new corporation as it did the rights of the minority who did not join in the new corporation. The stockholders who joined in the reorganization bought in their capacity as *the holders of the bonds and receiver's certificates*, which were liens on the whole assets in the hands of the Kansas corporation in the hands of the receiver. *This* was the character under which they chose to buy. They claim the minority of stockholders were cut off from any right in the property. So were they, as well, cut off as such stockholders. This Maine corporation acknowledges no liability for any debts of the Kansas corporation, nor any personal liability upon the contracts of that corporation.

There is, then, no transmigration of soul from the Kansas to the Maine corporation; no reincarnation here. The corporation must stand on its investment at the sale. So holds the case of *Dow* vs. *Biedelman*. The following language is used in that case, 125 U. S., p. 689:

"If the Memphis & Little Rock Railroad Company as re-organized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation, of the State of Arkansas, it was not the same corporation as that chartered by the legislature in 1853, but was a new corporation, subject to the provisions of the constitution and laws in force when it first came into existence, that is to say, in 1877. (*Memphis & Little Rock Railroad Commissioners*, 112 U. S., 609)."

As to the distinct character of a consolidated or re-organized corporation, see further:

Shields vs. *Ohio*, 95 U. S., 319, 323;

Keokuk & West R. R. vs. *Mo.*, 152 U. S., 301, 307-310.

Therefore, we submit that there is no possible ground upon which the foreclosure sale and the price realized upon it, can be excluded from consideration in arriving at the value of this water system; that, indeed, such price, flanked and supported as it is by the proved market price of the bonds and stocks, is entitled to paramount weight over all other evidence as to value. And that, inasmuch as the board placed a valuation upon the system about $125,000 in excess of what appellant had just paid for it, that fact in itself is a complete answer to the objection made by appellant that it has been deprived of the use of its property without due process of law.

G.

OTHER FACTS, CIRCUMSTANCES AND CONDITIONS AFFECTING THE VALUE OF THE WATER SYSTEM AND THE REASONABLE WORTH OF THE SERVICE RENDERED SINCE THE PASSAGE OF THIS ORDINANCE.

The Statute of 1885, Section 5, requires that in their relation to the value of the property actually used and

useful for furnishing water, all other facts, circumstances and conditions pertinent to fixing rates within the limits of net revenue prescribed by the statute, may be taken into estimation, to the end and purpose that the rates shall be equal, reasonable and just to the corporation and to the inhabitants.

An amendment to the Statute of 1885, Section 11½, provides that nothing in the Act contained shall be construed to prohibit or interfere with the vesting of rights under any contract for the sale or rental of easements and servitudes for the right to the flow and use of water.

The Board of Supervisors, as is clearly shown by the proofs, proceeded in making their ordinance, upon the theory of ascertaining the amount of annual expenses for repairs, management and operation of the whole water system; *and also the amount necessary to return a net profit to the company* of six per cent. per annum on the value of the system; and then sought to apportion the burden of raising the whole amount through the rates prescribed by their ordinance.

The board rejected all consideration of the ownership of water rights under the system, however acquired, as bearing upon the question of revenue to be raised by the rates.

We shall press upon the attention of the Court in a later portion of this brief, that under the Statute of 1885, and upon any principle of law or equity applicable, the fact of the acquisition of these water rights by the irrigators under the system is not a negligible quantity; and, that no consideration of the question raised by the appellant's attack upon the constitutionality of this ordinance, can with propriety ignore the fact that a great portion of

the irrigators under this system had bought and paid for their water rights under it; and that all others were put by the voluntary act of the company upon the same footing with those who did so buy and pay for their water rights.

But for the present, we shall discuss certain matters relative to the theory upon which the board acted, to-wit: that its ordinance was to provide not only the annual expenses, but also a net revenue of six per cent. per annum upon the value of the system.

Sec. 5 of the Act of 1885, already referred to (see appendix), contains the following provision:

"In fixing said rates, within the limits aforesaid, at which water shall be furnished to each of said persons, companies, associations and corporations, each of said Boards of Supervisors may likewise take into estimation any and all other facts, circumstances and conditions pertinent thereto to the end and purpose that said rights shall be equal, reasonable and just both to such persons, companies, associations and corporations and to said inhabitants."

Section 4 of the Act provides that the board shall estimate the value of all "*property actually used and useful to the appropriating and furnishing of such water*"; and upon the basis of the value so estimated the net revenue is to be computed.

Upon these provisions of the statute we make some general observations preliminary to the consideration of a number of specific matters which have an important bearing upon the appellant's contention that the rates under the ordinance are unreasonably low.

The fixing of a rate necessarily involves a determination of the proportion of the system which is "*used and useful*" for and to each rate-payer, considered distributive-

ly. Thus, if the "duty" of a system is reasonably estimated to be sufficient to supply water to 13,000 acres, if it be supposed that only 100 acres have been settled upon, it would be preposterous to impose upon the dwellers on the 100 acres rates sufficient to yield a net revenue of not less than six nor more than eighteen per cent. on the value of the whole system.

Again, the "duty", *i. e.*, the water-furnishing power, of a water system, ought to be reasonably commensurate with the physical structure—the reservoir and distributing works—of the system. If the water supply of the system is greatly out of proportion to, and relatively below, the cost and extent of the works, the utility and therefore the value of the whole system, as well as the revenue to be exacted for its use, must necessarily fall below what they would have been had the "duty" corresponded to the size and extent of the works.

If the extent of the works is materially greater than the water supply, it is apparent that the whole of the works is neither used nor useful for the furnishing of water.

The power, and therefore the responsibility, for creating a proper equivalence between the duty and the works of the system, belongs to the investor. He cannot properly throw the loss, or at least not the whole loss, consequent upon a disproportion between the water supply and the works, upon the public, and expect entire indemnity for his own lack of knowledge, skill or foresight in planning the system, at the expense of those whom he has invited to settle under it.

In this case, the water supply on hand when the board was called upon to frame its ordinance, was short; and the question of any addition to it, was that of the proba-

bility of a future run-off from the water-shed of the system.

Hence one of the difficult questions before the Board of Supervisors was to arrive at an estimate of this "duty" of appellant's system, which should be fair to both Company and consumers; that is, to arrive at a reasonable estimate of the future water-furnishing power of the system. This, as respects irrigation under the Sweetwater system, resolved inself into the necessity of arriving at an estimate of the number of acres which the system might *for the future*, and especially for the first year after the passage of the ordinance during which the rates were unchangeable, (Sec. 5 of the Act of 1885), be expected to be able to supply with water.

Such an estimate was necessary in order to arrive at a basis for apportioning the burden of rates for the future revenue, which the board assumed that it was its duty to provide and for which it undertook to provide. But in the nature of things when the question is judicially presented, after the adoption of the ordinance, whether it is so unreasonable as to be unconstitutional, the Court cannot shut its eyes to the demonstration of experience in respect to what the water-furnishing power of the appellant's system during the period of the operation of the ordinance has actually proved to be. The contention is made for appellant, that the Circuit Court should have confined itself to the evidence before the Board of Supervisors upon the point of the probable future water supplying power of the system, and should have rejected all the evidence taken by its examiner upon that subject, *after the event.* But, the board had no evidence before it, and could have none, as to the future actual rainfall and storage of water. It could only make a forecast upon the

evidence of past rainfalls. This evidence, however, did not conclude or control the future conditions of rainfall. It was the best that the board could avail itself of. But such mere speculations, wise guesses, or forecast of probabilities of the future water supply, to which the board was compelled to resort, would be strange evidence to be preferred to available proofs of the actual facts and event, in a judicial proceeding in which the constitutionality of the ordinance is challenged on the ground of actual injustice in its operation amounting to confiscation by reason of alleged grossly inadequate rates; and especially when the suit, as here, is urged to remove the obstruction of the ordinance, to the collection of demands for six years, arrearages of increase of rentals.

In such an inquiry in an original proceeding, the Court must prefer proofs of the actual conditions under which the ordinance has operated, rather than to shut its eyes to the historical facts and strive to put itself in the place of the board, to restore the veil of futurity which obstructed its vision, and to make an anachronic guess at the probabilities.

Among the facts, circumstances and conditions pertinent to the question whether the rates fixed by the ordinance are constitutional, we call attention to the following:

1. *Disporportion between the water supply and pipe system under the most favorable conditions of rainfall.*

2. *Continuous failure of the water supply since the enactment of the ordinance—a period of five years.*

G—1.

DISPROPORTION BETWEEN WATER SUPPLY AND PIPE SYSTEM.

The capacity of Main No. 1, nearly six miles in length, beginning at the dam with a diameter of 36 inches, reaching Chula Vista with a diameter of 30 inches, where one branch of 24, inch main, was planned to extend southward to supply Chula Vista, and one to supply National City, is 1,200 inches. (Witness Schuyler, Record pp. 296-302.) That is, this main is large enough to deliver each year at Chula Vista about the full capacity of the reservoir, as originally built, nearly six billions of gallons. (Record, p. 297.) This was done in view of the original estimate of the annual "duty" of the reservoir and water supply, that it was sufficient to irrigate 20,000 acres besides supplying all domestic uses. (Schuyler, Record pp. 310-311.)

It is evident that it was at that time assumed that the reservoir would fill each year, and the great main was built with a capacity to deliver annually that amount of water, *i. e.*, sufficient each year for 20,000 acres.

In addition is the 24-inch main No. 2 to National City, built in 1895, which reaches "territory that was not reached by the old pipe line."

Witness Boal, Red p. 331; Savage, Record p. 414.

It appears by the Company's own witness Schuyler, the engineer who took charge of planning and building the system (Record p. 309), that prior to the construction of Pipe Line 2 to National City the distributing pipe system, which branched from the great main No. 1, was extended to cover an area of over 1,300 acres. (Record, p. 310.)

But owing to the disappointing experience in the water supply, the witnesses before the board estimated the "duty" of the system, *i. e.*, its water supply, at little less than 7,000 acres. Schuyler put it at one-third of his original estimate of 20,000 acres. (Record pp. 289-311.) Mr. Boal thought that under proper economic use of water it might possibly reach from 7,000 to 9,000 acres. (Record, p. 354.) Alverson put it at 6,980 acres. (Record, p. 499.) Mr. Savage puts this "duty" at from two to two and a half billions of gallons annually, which is about 7,000 acres at 350,000 gallons per acre. (Record, p. 415.)

The Board of Supervisors, upon the testimony, adopted an estimate of the duty of 6,080 acres outside of National City. Mr. Savage at one time gives the number of acres irrigated within National City at 784⅛ (Record, p. 335), and again at 867 acres (*ibid*, 448). So that the estimate of the board is based closely upon the evidence.

Thus, on the basis of the proofs before the board, there was an enormous disproportion between the carrying capacity of the pipe lines and the area over which they were extended, on the one hand, and the water supply on the other. At the estimate of witnesses before the board, the full probable water supply would employ less than one-third of the capacity of the great main No. 1; and would supply only about one-half of over 13,000 acres covered by the mains and laterals.

Thus, at the highest estimate, before the board, of the water supply, the size and area covered by the pipe system, and therefore its cost, was out of all proportion to the service it could render, for want of the water to carry. This disproportion is acutely accentuated by the subse-

quent history of the failure of the water supply for the full five years last past, as will be hereafter dwelt upon.

Consumers, even under the maximum of the Company's water supply, bear their full share of the burden of this disproportion, upon the basis of the acreage fixed by the Board as the duty of the system.

The highest number of acres at any time under irrigation within and without National City was 4,600, and outside of National City 3,733 acres, according to Mr. Savage's latest statement. (Record, p. 448.)

Counsel find no fault with the estimate of the total duty of the water supply outside of National City as fixed by the board, upon the evidence, to-wit: 6,080 acres. It must be apparent, that if the expense of maintaining, and also net revenue upon the value of the whole system covering 13,000 acres, is, so far as irrigation rates are concerned, to be imposed on 6,000 acres, this is the most favorable basis for the company and correspondingly burdensome to the consumers. It is the contribution of the consumers to the burden caused by the mistake of the original company; and we think it is, to say the least, their full share of such contribution.

Yet the corporation takes the position that the 3,733 acres actually under irrigation outside of National City, should pay the full quota of expense and net revenu[illegible] the whole 6,080 acres.

But counsel insist, nevertheless, that the burdens of the irrigators should be still further increased, under the claim that the board should have imposed all the income to be raised outside of National City for maintenance and for net revenue on the whole value of the system, on the

land actually irrigated, and not, as the board did, on the 6,080 acres which the system ought to irrigate, according to the finding.

The theory of counsel comes to this in the present case, to-wit: That, given a water system, constructed in its most costly parts upon the calculation to store and carry water for 20,000 acres, with its pipe lines extended over more than 13,000 acres; yet though only 4,600 acres are under irrigation, the owners of these must not only pay for maintaining the whole system *in repair and ready for operation;* must not only maintain a full-blown retinue of officials and attorneys stretching across the continent; must not only pay the taxes on the whole distended outfit, but must also pay the statutory net revenue on the cost to the former corporation of the whole system—not only of the part used—but also of the part not used, and held idle, awaiting the time when the corporation can utilize it to sell more of its raw land as irrigated lands, at big prices for land and water.

In the meanwhile, it proposes to collect in addition, under head of depreciation, a sinking fund on the whole system at the rate of $45,764.25 each year. (Record, p. 544.)

Net revenue on the *whole*, from users of the *part*, is insisted upon, because the board did not fix the rate of net revenue at eighteen per cent. per annum; and either eighteen per cent. on the part used, or six per cent. on the whole, is asserted to be "the full compensation allowed by statute" (Brief for App't, pp. 44), no matter how small the number of consumers.

Surely, the case of complainant does not lack for audacity of presentation.

For the valuation contemplated by the statute is to be placed upon the property *actually used and useful* to the furnishing of the water.

This coincides with the element in the fixing of all rates, upon which the Supreme Court has laid increasing emphasis, and which it thus defined in the case of *San Diego Land Company* vs. *National City*, 174 U. S., 739, 755, adopting the language of the Court in *Smyth* vs. *Ames*, as applicable to that case :

"But the rights of the public would be ignored if rates for the transportation of persons and property on a railroad, are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

The rate of net revenue fixed by the statute is rigid in respect of the minimum of six per cent. and the maximum of eighteen per cent. upon the estimate of the value of the property so "*actually used and useful.*"

And if no account is to be taken of the proportion of the value of the whole system which is "*actually used and useful*"; but if the users of *part* capacity of the system must pay not only for *maintaining the whole*, but, also, the *statutory net revenue on the whole*, will any one point out where any room is left for consideration of the "fair value" of the property used for the public, or the "fair value of the services rendered"? There is none.

If no room is left for these considerations, then the basis contended for by counsel, if enforced, is itself unconstitutional, since it would lead to ignoring the "rights of the public" through rates exacted without reference to the

property used and useful, or to the services rendered. (174 U. S., p. 755, *ubi supra.*)

The Board adopted the correct principle for apportionment of burden of revenue for irrigation on the acreage.

We submit that if the statute is not to be turned into a mere travesty of regulation, the board so far forth proceeded upon the correct principle, in apportioning the burden of the revenue, calculated on the value of the *whole* system, due from irrigation, over the whole 6,080 acres which it found the system ought to supply, instead of on the 3,733 acres actually irrigated (when there is water).

If the revenue to be contributed from the use for irrigation is thus apportioned, each man pays an acreage rate, which yields his full proportion on the value of so much of the system as is used and useful to him for that purpose; it is absurd to argue that he is responsible for loss to the company from that part of its system which, though it might be used for an additional acreage, is idle either for want of water or for want of additional purchasers of land.

But in the application of the principle the board erred in overlooking domestic rates paid. Such error inures, under the ordinance, to the benefit of the company.

But the company has profited by an error committed by the board in framing the irrigation rates. The board makes the *irrigation rate alone responsible for the whole quota of annual expenses and net revenue* to be raised outside of National City; *and overlooked the returns from domestic rates.*

This is brought out in the cross-examination of Supervisor Cherry (Record, p. 82); and is apparent on the face of the findings. These domestic rates for human beings and animals are 30 cents per thousand gallons.

Record, p. 9.

Such domestic rates contributed in 1896, outside of National City, to the revenue, amounted to $4,535.13; in 1897 to $3,927.77, which, considering that the quality of the water was so bad that the people were driven to get drinking and cooking water elsewhere, is a large income. The figures are based on the income given for the system outside of National City in the company's exhibit (Record, p. 545), considered in connection with the fact that the land under irrigation outside of National City is 3,373 acres; and, therefore, the irrigation return at $3.50 per is $11,805.

But it is important to notice that of this revenue, the 1,353 acres irrigated by the company outside of National City, pay only $242.00; so the land owners other than the company, holding 2,020 acres outside of National City, pay substantially all the domestic rates (Record, p. 263); and in Chula Vista, Ex-Mission and Chollas Valley the domestic rates equal upon the average the irrigation rates. In other sections where the ranches are larger, they fall below the irrigation returns. (Record, pp. 340, 341.)

Now it is the policy of the company to hold all this large body of irrigated lands, 1,546 acres within and without National City (Record, p. 448), and not sell them, therefore not to settle them (Record, pp. 340, 355, 364).

The effect on domestic rates is shown above; that is to say, one-third of the acreage under the system, which is

held by the company, has no residents and contributes substantially no domestic rates. And it is the policy of the company to keep them so.

Of these important considerations the company has the benefit and the consumers the burden, under the rule for apportioning burdens adopted by the board.

Thus far the disproportion between the pipe system and the water-furnishing capacity has been considered upon the basis of the average rainfall as experienced down to October, 1897, when the ordinance was passed. Under such rainfall the reservoir had yielded from two to two and a half billions of gallons of water each year since the opening of the system in 1888—nine years (Record, p. 415). This, upon the allowance of from one acre foot (326,000 gallons, Record, p. 297), to 350,000 gallons per acre, indicated a duty of between six thousand and seven thousand acres, as shown by the testimony.

It has been found that the two main pipe lines, aggregating between 11 and 12 miles in length, during the most favorable period of rainfall since the inauguration of the system; have a capacity of at least four times the water supply annually stored in the reservoir; and that the distributing system connected with these mains is spread over more than 13,000 acres, twice the maximum area which the system has been able to supply with water since it was opened in 1888 down to the date of the ordinance in 1897.

It appears that this disproportion necessarily must reduce proportionately the estimate of the portion of the system used and useful for furnishing water, and shows how unreliable is the evidence of cost of construction to the Kansas corporation, as a measure of the utility of the

system, for furnishing water, and of its valuation as a basis for net revenue.

It appears that the expenses of repairs, maintenance and operation have also necessarily been likewise disproportionate to the utility of the system, and that the burden of the consumers for maintenance was proportionately excessive.

It appears that the consumers of water bear, under the most favorable conditions as to rainfall, their full share of the burden of this disproportion, when the sum to be raised from irrigation rates is divided between 6,080 acres, the estimated duty of the system, rather than between the more than 13,000 acres covered by the distributing system; especially is this so, when it is considered that virtually all of the unirrigated land is owned by the company, and that the excessive spreading of the system was done to make such lands salable.

It also appears that the income under the ordinance includes domestic rates outside of National City, to which the company contributes only $242.00, though it has one-third of the land under irrigation; and it further appears that in assigning the burden of raising the required revenue, the board overlooked the income provided in their ordinance from domestic rates, and charged upon the lands the whole amount to be raised; and that, therefore, to the extent of the domestic rates, the company has a double income provided for by the acreage rate under the ordinance.

In view of these additional considerations can it be said with the smallest show of propriety, that this ordinance deprives the corporation of its property without due process of law? We submit emphatically not.

G—2

DISASTROUS DEFICIENCY IN THE WATER SUPPLY TO WHICH THE ORDINANCE RELATES.

But for the five years last past, covering five full seasons of possible rainfall in this region, a most disastrous experience has overtaken both the corporation and all persons dependent on this water system for water.

The amount of water stored in the reservoir of the company on October 10, 1897, in which month this ordinance was passed, was 1.156 billions of gallons. (Record, p. 535.) This proved to be one-third of the normal supply for the first year after the passage of the ordinance to the 4,600 acres under irrigation from the system. The hope at the time of the hearing before the board for increase of this amount for the first and subsequent years of the life of this ordinance, lay in the expectancy of new catchment from the drainage basin of the system. At the time the ordinance was passed, the amount that would be stored from the succeeding winter's flow, was merely forecast; the making of such forecast was the legislative exercise of discretion upon probabilities. It is doubtless true, that in fixing the irrigation rate by the acre, and in fixing the specific domestic rates, as by the house, rooms, the animals, the carriages, etc., the board assumed that the company's system would catch and store sufficient water to supply all the irrigation and domestic uses of the people, and also employ all the normal capacity of the system which it was adapted, under the assumed probabilities of rainfall, to store and deliver. (Record, p. 84.)

But what was then mere forecast and probability, has

now been discounted by experience. And we are not to sin against the light as it exists.

History of Irrigation Year, 1898.

For the first year and irrigation season after the ordinance took effect, November 16, 1897, the company's engineer, Savage, testifying on December 13, 1898, on examination by counsel for complainant, said: (Record, pp. 105-107.)

"Q. What has been the experience of the company for this last irrigating season, with reference to its water supply and the ability of the system to serve the consumers?

"A. Heretofore the drainage basin has always yielded us some water for storage purposes, and also the rainfall of the winter has left the soil in a somewhat saturated condition. This past winter not only didn't afford us any water for additional storage, but the ground was thoroughly dry at the beginning of the season, demonstrating that the duty of the system was less than it had been estimated to be from the observations of the preceding years through which it had been operated.

"Q. What has been the extent of the ability of the system to supply water during the present season, or the last season? The last irrigating season?

"A. *We have been unable to supply the quantity of water that the orchards reasonably required.*

"Q. About what proportion of the full supply that you had formerly furnished have you been able to furnish this year?

"A. I have not any figures at hand to show accurately, but in round numbers probably *about one-third the quantity* of water has been delivered this year that has been delivered in the past years per acre.

"Q. What is the condition of the reservoir at the present time as to its supply of water?

"A. *The reservoir is substantially empty.*

"B. You say "substantially". Are you able to supply any water for irrigation at the present time?

"A. It is doubtful if there is any water running in the pipe line from the reservoir at the present time.

"Q. When was the supply entirely exhausted?

"A. The supply was exhausted the 9th day of this December.

"Q. Previous to that time was there any notice given by the company warning the consumers against the use of water for irrigation purpose in view of the limited supply?

"A There was the last week in *September;* such a notice was sent out.

"Q. *Did irrigation cease from that time on?*

"A. *It did.*

"Q. Then you have had practically no water for irrigation purposes from the reservoir since the latter part of September?

"A. Until the recent court's decision—

"Q. What court do you refer to now?

"A. The Superior Court of San Diego county—Judge Torrance.

"Q. Is that the case that has been referred to here, in which the question arose between the consumers of domestic water and those using it for irrigating purposes?

"A. It was.

"Q. I believed it was held in that case that there was no preferred right to the use of the water for domestic purposes, but that the irrigators were entitled to use water as long as there was any water in the system?

"A. It was so held.

"Q. What was the result of that upon the supply in the reservoir?

"A. The supply was rapidly exhausted, lasting less than a week.

"Q. Then with the present condition of the system, taking this year as a sample, you have no reservoir supply on hand for the coming year?

"A. We have no supply whatever on hand at the present time.

"Q. And the next year the consumers will have to depend entirely upon the water that can be stored by the rainfall?

"A. They will, unless a supply be obtained from some other source."

It appears that about March 26, 1898, in view of the

short water supply in the reservoir, an agreement was entered into between the company and the irrigators of land, for the apportionment of the water available for irrigation. (Record, p. 142.)

But notwithstanding, in September, 1898, the company was party defendant to an amicable, not to say collusive, suit promoted by the company, brought in the name of National City against the company as defendant, to which the company made no defense, in which an injunction was issued enjoining the company against delivering any further water for irrigation. Then the notice copied in the record was sent out by the company to the people, threatening them with proceedings for contempt and prosecution under the criminal law and deprivation of all water, if they used any for irrigation. The ground of this suit was a claim that all the water was needed for domestic supply. (Record, pp. 108-109.)

Yet the proof shows that the dregs left in the dam—then a mere alkali sink—were so execrably bad as to be unfit and dangerous for use by men or beasts; and people were getting their domestic water elsewhere. Mr. Savage's view, however, was, that it "was more valuable for a domestic supply than it was then to irrigate the orchards." (Record, p. 109). Since the ordinance rate for domestic supply is based on thirty cents per thousand gallons, from the company's standpoint, this was doubtless true. (Record, pp. 9, 115.)

So irrigation ceased, September 28, 1898, until sometime in December, 1898, when the company caused certain consumers who declared their intention to irrigate, to be made defendants in that action, and upon hearing had, the Court refuse to grant an injunction against them, or

continue any injunction. The remainining supply was exhausted in less than a week.

Record, pp. 106-109, 95, 119.

But the company while more than a consenting party to this prohibitory proceeding, collected the ordinance rates for irrigation as well as domestic rates, throughout the whole period. (Record, pp. 109, 119, 146.)

The effects of this history during the first year's operation of the ordinance, on the orchards and domestic supply, is detailed in the evidence of numerous witnesses, in December, 1898, before the examiner. Williams, p. 134; Gavin, pp. 135-136; Stearns, pp. 137-139; Daschbach, pp. 139-140; Whittemore, pp. 144-145; Crellin, pp. 145-146; Palmer, pp. 147-148; S. W. Haines, pp. 148-151.

It is sufficient here to sum it up by saying that it was disheartening and disastrous to consumers. Yet they paid the ordinance rates for all the uses regularly. (Boal, Record, p. 155.) See also the statements of witnesses in June 1899, before the examiner: Dale, p. 253; Daschbach, p. 256; Crockett, p. 257.

Service During Irrigation Year 1899.

The season of 1898 ended with no supply of water whatever on hand. (Savage, Dec. 13, 1898, Record, p. 106.)

During the second year after the enactment of the ordinance, the company was able to furnish from its reservoir, only 10,000 gallons per acre, or one-thirty-fifth of the normal supply. This was the whole catchment of the year 1898-9.

(Boal, June 14, 1899. Record, p. 152.)

After that was exhausted, the reservoir was idle and the distributing system of the use only so far as it could be used with pumping plants from wells. But the full ordinance rates, both for irrigation and domestic use, were collected at all times since the enactment of the ordinance, also an additional contract rate of 3½ cents per thousand gallons for all pumped water under the contract of April 6, 1899, set forth in the record. (Record, pp. 153-155.)

To the terms of this contract we shall recur later on.

The sinking of wells and pumping under this contract was the last resource, because of the fact as Mr. Boal says, on June 14, 1899, (*ibid*, 156):

"The failure to receive in the past three years any addition to our supply through the ordinary rains."

SERVICE IN 1900, 1901 AND 1902.

The testimony in this case closed in June, 1899, showing the supply of water for the first two years of the life of the ordinance. The subsequent history of the service of this system, if the evidence could have embraced it, would be material in its bearing upon the value of the plant as an irrigating system, in view of the pecuniary results sought to be obtained by this appeal as hereinbefore stated.

Counsel for appellant are frank enough to make the following statement in their brief (p. 22):

"It is a well-known fact, so well known that this court will take judicial notice of it, that the rainfall has not been sufficient for the past five years to fill the storage reservoir of a single one of the large water companies supplying water for irrigation in Southern Caliifornia."

And on page 47, *ibid*, counsel say:

"The court will take judicial notice of the fact that, the last three seasons have been years of extreme drouth."

We accept this as true. But we must trust to the candor of opposing counsel, so far as the years are not covered by the evidence, to concur with us in the following more specific statement of the actual conditions of the water supply to which the ordinance relates, during the five years next following November 16, 1897, the date of taking effect of the ordinance.

The normal water supply is 350,000 gallons per acre per annum. (Rule XIII of the company, Record, p. 569.)

As above shown, for the first year after the ordinance, the supply was one-third; and for the second year it was 10,000 gallons to the acre, *i. e.*, one-thirty-fifth. For the third year the supply was nothing; for the fourth year it was 65,000 gallons to the acre, or less than one-fifth; and for the fifth year it was nothing, and the reservoir at this date was empty.

Thus the fractions of supply from reservoir each year from 1897 to 1902 were as follows:

For 1898, ⅓ or	70-210
For 1899, 1-35 or	6-210
For 1900, 0 or	0-210
For 1901, 65-350 or	39-210
For 1902, 0 or	0-210
Total for five years	115-210

Average per year 23-210, or approximately eleven per cent. of the normal supply.

For this fractional supply, *full* irrigation and domestic rates have been paid under the ordinance, to-wit: $3.50 per acre per annum and the equivalent of 30 cents per

thousand gallons for domestic uses; and what the quality of the domestic supply from the dregs collected in the reservoir for ten or more years has been, the testimony shows.

So much respecting the extent, quality and cost of the supply under the ordinance. But to a full understanding of the situation it is necessary to take into consideration the pumping contracts and the extent of the relief afforded under them and the additional cost for the water pumped. This water was forced into the distributing system and to that extent the system was used under the pumping contracts. But the pumped water delivered was paid for at additional contract prices over and above the ordinance rates.

The ordinance was made a term of the pumping contracts for the years 1899, 1900, 1901 and 1902.

It will be noted that the pumping contract of April 6, 1899 (Record, pp. 153, 155), makes the ordinance rates an element of its term and superadds to the ordinance rates the special rate for pumping water. The contract contains these clauses (Record, p. 154):

"And * * * in order to pay for the pumping of water, and for no other consideration, the parties of the second part severally * * * agree and bind themselves for all water pumped by the party of the first part during the year 1899, so long as is necessary to pump the same and used by them for irrigation, they will pay *in addition to the respective acreage rates for irrigation and domestic rates, an additional rate of 3 1-2 cents per one thousand gallons*, payment to be made therefor monthly or quarterly in advance as now provided by the rules of the company for the payment of rents for water supplied. * * * * * * * * * * * *

And it is expressly agreed that the amount "*over and above the regular rates for irrigation and domestic use* is additional consideration for the pumping of said water,

and not as for water rentals for said water, which work of pumping water is undertaken by said party of the first part under this agreement solely."

The testimony shows that the phrases "acreage rates", "domestic rates", and "regular rates", employed in the above extracts mean the *rates under the ordinance* in question here. (Witness Boal, Record, p. 155.)

As the testimony closed in June, 1899, the proofs do not disclose the arrangements between the company and the consumers to obtain such relief as could be had against the continued shortage of water for the years 1900, 1901 and 1902.

But we shall task the candor of opposing counsel further by saying that they will not deny the statement that the consumers entered into new pumping contracts with the company for the seasons of 1900 and 1901 in the same terms with that for 1899, above referred to, except that to compensate the company for putting in more wells and pumping plants, the agreement was to pay *six and one-half cents per thousand gallons for all water pumped and used for irrigation in addition to all the ordinance rates both for irrigation and domestic uses.*

For the year 1902 the contract of 1901 has been followed without express renewal.

Therefore, since the first year of the life of this ordinance, the ordinance rates have entered into the *contract price* for the pumped water delivered through the pipes of this system.

The testimony shows that for the season of 1899 the amount of water that could be apportioned from the pumped supply was five hundred gallons per acre daily,

and that the people were calling for "more". (Savage, on June 29, 1899, Record, pp. 250, 251-2.)

Naturally they would, for if furnished throughout every day of the year, this would amount to only 180,000 gallons per acre—a little over one-half of the normal supply of 350,000 gallons for the irrigating season. This supply admitted of no acceleration. It was necessarily a dribble, and, as a matter of fact, has not been exceeded and hardly sustained for the years 1900, 1901 and 1902.

That much water for irrigation if furnished, which could not be at the restricted daily quota during the, say 250, days of the irrigating season, would have cost under the contract of 1899, $6.30 per acre for the pumped water and $3.50 additional for the ordinance acreage rate, a total of $9.80 per acre for the partial irrigation of that year. The same amount of water for each of the seasons of 1900, 1901 and 1902 would have cost $11.70 per acre for the pumping, to which is to be added the ordinance rate, making this insufficient supply cost $15.20 per acre. Besides this the people paid city domestic rates for persons and animals, which, to an agricultural community, is very burdensome.

But the enhanced cost of the water, although in a series of years it would wear out any community, is not so irreparable as the large amount of the actual ruin and necessary abandonment of orchards for want of water.

The people and the company, as well, have abandoned large areas of orchards. This must necessarily have followed from the prolongation of the shortage of the water supply, the effects of which for the first season of 1898, after stoppage of irrigation on September 28, 1898, by the

injunction, worked such disaster in three months as is detailed by the witnesses (*supra*, p. 72).

The mere planting and care of these orchards until five years old, cost, according to the testimony, over $400.00 per acre, exclusive of the first cost of the land and interest on capital invested, and the personal labor of the owner, for just the actual money spent. (Witness Dale, Record, p. 255.)

The theory of the corporation and its counsel, however, is that these notorious and indisputable facts should be ignored; and the court below is severely criticised for giving them any consideration.

The practical demand of the corporation is that the acreage rates should be increased, as the service of the system decreases; and that such decreased service is to be accounted precious in direct ratio to the amount of suffering and loss which the failure of the service causes to consumers; and that the value of diminishing service is to be computed according to a formula made by converting into an economic and revenue producing maxim the apothegm that "blessings brighten as they take their flight."

We have already referred to the fact that while the apportionment agreement pursuant to the action of a mass-meeting of the consumers March 26, 1898, entered into as recited therein "in view of the short visible supply impounded in the reservoir," was in force (Record, pp. 142, 143) and even after the company had procured itself to be enjoined from furnishing any water for irrigation, it still claimed that the acreage rate was inadequate, and gave notice of the reservation of a right to collect a higher rate "*pursuant to a decree of court*". (Record, p. 119.)

What this meant, was the seven dollar rate under the decree in *Lanning* vs. *Osborne* (Record, p. 258) in case this ordinance was set aside in this action.

To illustrate the persistent attitude of the company in this respect we venture to copy into this brief, although not in the record, the form of receipt issued by the company for water rates paid while the contracts for pumping have been in force, and call especial attention to the portion italicized in the copying:

"$20.05 NATIONAL CITY, CAL., 11–17, 1902.

"Received of . . . . . the sum of 20 and 5-100 dollars account water rent from Sept. 1, 1902, to Nov. 30, 1902, for the purpose embraced under application No. 144 subject to the Rules and Regulations of the company.

"*This amount is accepted under protest and subject to the right of the company to collect a higher rate in case the ordinance of the Board of Supervisors shall be declared void by the courts.*

"E. A. HORNBECK, Assistant Treasurer.

"12,580 Per J. Gould."

The witness Koebig, brought from San Bernardino County as an expert, mainly to give a lot of irrelevant figures respecting water systems in other counties, so diversely circumstanced that his figures threw no light on the situation here, had a theory which is that of the company and its counsel.

As a sample, he says (Record, pp. 231-232):

"A. If the company was only supplying one-third the amount which is represented by 350,000 gallons, then the amount chargeable would be three times as large per thousand gallons. * * * *

"Q. Upon that reasoning you mean to say they ought to charge just as much for delivering one-third as for delivering the whole?

"A. *Certainly. They have their dam there, and their pipe lines, whether they deliver one inch or 800.*

"Q. Assuming that in the second irrigation season after the adoption of this ordinance there was no water in the reservoir, would you say the same would hold true—that the charge to be collected by the company should be such as you have stated in your statement here?

"A. *Yes, sir. I could not make any change in that.*

"Q. Your theory is that the company has a fixed investment, and is entitled to its six per cent. under the statute whether it is able to furnish water or not?

"A. With this restriction; whether it is able to furnish water or not without any neglect of its own. Of course, if the company is charged with any neglect resulting in the failure it would be different."

Mr. Savage's ideas do not seem materially different. (Record, pp. 107-108.)

Yet, zealous servant of the company that he is, Mr. Savage in December, 1898, could not precisely see any basis for the company to apply to the Board of Supervisors to fix rates anew, as the company had the right to do; He was asked:

"Q. It would be somewhat incongruous * * * * to ask the board to fix rates for furnishing water you are not in position to furnish at all, would it not?

"A. It certainly would look a little peculiar at this time."

Record, pp. 111-112.

But the same conditions prevail now that did then; the reservoir is dry.

Counsel undertake to make much of what may be called their "five-cent-a-tree" argument, and suggest that if the fruit-growers under the system cannot pay more "they may as well go out of business." (Brief, p. 36.) But they do pay more, and always have paid more even when, as half a decade ago, they got the water they paid for. For

the proofs show that their domestic rates bring the cost of water up to double the amount paid merely for irrigation, so that for the use of water for all purposes of living upon and cultivating a tract, they have always paid $7.00 per acre. But that is not all. The fact is truthfully stated in the official statement signed by the then president of the Kansas corporation and circulated by the company as follows:

"As is the case with all the land of the San Diego Land and Town Company, *the water is sold with the land and becomes perpetually attached to it.*"

(Record, p. 356.)

Purchasers from the company paid, on the average, full $300.00 and more for this land and water sold with it. (Record, pp. 355, 364-366.)

Counsel for appellant are kind enough to tell us, what is the simple truth, when they say (Brief, p. 32):

"But the facts here show beyond controversy that the land supplied by this system is, without irrigation, semi-arid and practically of no value for agricultural purposes, and that with water it is wonderfully productive; that *without* water the land was worth from *twenty-five* to *fifty dollars an acre.*"

This shows that the purchasers from the company paid an average of at least $250.00 per acre for their water rights. Of this money the company has the use. At six per cent. per annum, that use amounts to $15.00 per acre each year. This brings the price of the annual water supply, when the reservoir furnishes it, and no pumping is necessary, to every resident purchaser of land under this system, up to $22.00 per acre per annum under the ordinance.

Those who did not buy their land but only their water

right from the company at from $50.00 to $100.00 per acre paid, at the same rate for use of money, from $3.00 to $6.00 per acre in addition to the $7.00 ordinance rates, that is, from ten to thirteen dollars per acre per annum. As to others whom the company has put voluntarily on the same footing as to annual rates, with those who bought of it and paid the enormous prices for water-rights, there is no reason why the company should now undo what it voluntarily did from ten to fifteen years ago; and it certainly is no reason why the company should deprive those who in any form bought land and water, or water rights alone, of their vested rights.

This is the answer we make to the five-cent-per-tree argument at its best estate.

But when the supply for which this tremendous annual charge is paid has for five years been but eleven per cent. of what is reasonably necessary; and when, in addition, there must be paid six and one-half cents per every thousand gallons supplied by pumping, we submit that the five-cent-per-tree argument sinks to a low level of absurdity.

And after all this history of disaster, these people are met by the ungenerous sneer, that if their business will not admit of an additional increase of $3.50 per acre per year over the ordinance rates, plus the pumping rates, and, notwithstanding the inadequacy of the supply, they "may as well go out of business." It was remarked of the government of a certain European state that it was a despotism tempered by assassination; but this is a tyranny distempered by its own stupidity.

For we are compelled to concede that many of these

people have gone out of business, and more are going out because driven out. The barrenness and death of which counsel speak, the consequence of the want of water, has overtaken every orchard upon which the owner has not cumulated his apportionment of water by buying the quotas of his neighbor's abandoned orchards, or by a well and pumping plant of his own. The value of the land, it must be conceded, under this system, is rapidly gravitating to the original standard of from twenty-five to fifty dollars per acre. Mr. Boal, testifying in October, 1897, stated and admitted that the growing of fruit under the system was an experiment and the question of how good a living the people could make on these lands was problematical. (Record, p. 355.)

This is too true. If that was so *then*, what it must be now, can be inferred from the subsequent history in evidence, and the continuance of that history to which we have ventured to refer.

And when the people leave, or cease to try to maintain their orchards and groves, as is increasingly the case, the company, like Selkirk on his desolate island, will have gained, what is apparently the darling wish of its directors and counsel, and be left solitary, the "monarch of all it surveys." The rule or ruin policy is working out its results.

But we observe that the salaries, including that of attorneys, do not diminish with the vanishing water supply, or the shrinking acreage of the orchards; nor do they suffer for want of irrigation, or litigation against the people by whom the company lives.

We close the discussion of the failure of "duty" of the system by pressing the inquiry as to the bearing of this

five years of failure in the catchment and storage of a water supply, even though it be from natural causes, upon the valuation of this system to be taken as a basis for an acreage rate and for the lump rate for the several domestic uses as fixed by the ordinance; for the method of collection of water rentals, under the ordinance, which prevails, is the specific rate of so much per acre, and so much per person, bath-tub, closet, etc.

We submit that this failure not only affects the value of the service which the system has rendered since this ordinance was passed—and therefore the value of the system during that period—but that the revelation of so fearful a deficiency in its water supply, shows that the permanent value of the system *measured by its utility*, is far below the valuation fixed by the Board of Supervisors; below even that paid by the corporation at the foreclosure sale.

So that these people in paying the ordinance rates have not only been paying far more than the service of the system has been worth at any time since the ordinance was passed; but that a system, which for a series of years must be kept up, like an exhausted patient, by the transfusion and pumping of the life-giving fluid into its veins; and when even this expedient supplies a circulation insufficient in quantity, deleterious in quality, and ruinous in expense, must, in the nature of the things, be a precarious reliance for a system of orchards. What has been may be again. Much as it is to be regretted, the facts show that the real value of this system has permanently fallen below what could have been conceived possible five year ago; and the value of the orchards and lands has fallen with it.

In this posture of the case, the contention that this failure of the water supply should not be considered as bearing upon the value of the system, of its service, and of the rates based upon such value and service, we submit is as inadmissible as though in a suit at law now brought by appellant to collect a demand for six years arrears of increase of rentals above the ordinance rate, as the reasonable value of the service, it were insisted that the facts as to the actual service rendered during those years should not be considered.

We submit also, that since the pumping contracts have been in force, the ordinance rates have entered into the aggregate contract price of the water furnished by pumping; *i. e.*, that the pumping rate was fixed, upon taking into consideration the ordinance rates for irrigation; and not upon the assumption that the ordinance rate was to be duplicated and therefore the aggregate cost of the pumped water increased. So that the corporation is in truth estopped by the special contracts from disturbing the ordinance rates for the past.

Any future conditions may be met by the action of the Board of Supervisors: and such action may be invoked by either party.

(Sec. 6 of Act of 1885.)

II.

THE FACT OF THE PRIOR ACQUISITION OF WATER RIGHTS IN THIS WATER SYSTEM BY THE IRRIGATORS OF LAND UNDER IT, IN ITS BEARING UPON THE APPELLANT'S CONTENTION THAT THE ORDINANCE OF THE BOARD OF SUPERVISORS DEPRIVED IT OF THE USE OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, IS NOT A NEGLIGIBLE QUANTITY.

Appellant's brief presents its case here on the assumption that, under the facts, it was the absolute duty of the Board of Supervisors to so fix rates as to yield to appellant not less than six per cent. net revenue (above the cost of repairs, operation and management) on the whole value of the plant and system so far as used and useful for supplying the consumers with water. This was the theory upon which the board framed the ordinance and upon which the Circuit Court upheld it.

We have thus far pursued the argument on part of appellees to show that the ordinance is, even upon that theory, unimpeachable.

But under the above head, in behalf of the public, which is represented by the Board of Supervisors, we press upon the attention of the Court a matter of capital importance, arising out of the claim of ownership of water rights by the consumers of water under this system, and their contention presented by their claim and protest filed in the proceedings before the board (Record, p. 6), and the evidence offered in support thereof.

The Board of Supervisors, as already pointed out, deemed it to be its duty to ignore this "claim and protest,"

and all the evidence of the prior acquisition of water rights in the system by purchase, or otherwise, which was introduced thereunder.

This is shown by the "Findings" made by the board. (Record, pp. 73-74.)

It also appears from the evidence in the cross-examination of Supervisor Cherry, called by appellant:

"Q. Now in your findings that were agreed upon by the board, as you have testified, before passing the ordinance, you do not take into consideration water rights do you?

"A. No, sir.

"Q. And you state nothing in your findings about any contract rate between consumers and the company, do you?

"A. No, sir."

Record, pp. 81-2.

The same fact also appears from the following paragraph of the sworn answer, which is nowhere contravened:

"And these defendants aver that the said Board of Supervisors in fixing said rates and adopting said ordinance disregarded entirely said protest and the proof made thereunder, and the said claims of said consumers, and established said rates by said ordinance in conformity with the requirements of law, and so as to yield the complainant six per cent. upon the present actual value of its plant, after paying the expenses of repairing, operating and managing the same."

Record, p. 36.

This effectively negatives the allegation in the bill (Record, p. 12), that the board acted upon the protest and the proof made thereunder and fixed rates accordingly.

This rejection by the board of all consideration of the acquisition of water rights, was in deference to the opinions of Judge Ross in *Lanning* vs. *Osborne*, 76 Fed. Rep.

319 (Sept. 14, 1896), and in the previous case of *San Diego Land and Town Co.* vs. *National City*, 74 Fed. Rep. 79, in which that learned jurist, upon the most deliberate conviction, but, as it proved later, an erroneous view of the constitutional policy of this state, had held that no purchase of water-rights from a company which had devoted its system to public service, was of any validity, or could confer any right by way of easement, or otherwise, in the water system, or have any effect upon the annual rates to be afterward fixed by public authority.

This Court has not found it necessary to pass upon the question as to whether such a corporation could make valid contracts with respect to water-rights, in either of those cases in which the question was mooted in this Court on appeal, viz: *San Diego Land and Town Company* vs. *National City* (May 22, 1899), 174 U. S., 739, 760; or in *Osborne* vs. *San Diego Land and Town Company* (May 14, 1900), 178 U. S., 22, 36.

But since the hearing before the Board of Supervisors, and the passage of the ordinance under consideration, and after issue joined and the testimony closed in the present case, it has been definitively decided by the Supreme Court of the state, and by the Circuit Court of Appeals of this circuit, after a re-hearing, and upon full and mutual concurrence of the two appellate courts, with each other, that contracts upon these subjects between irrigation companies and owners of land in California, are not forbidden either by the constitution or statutes of the state and are to be given effect like any other contracts.

Fresno Canal Co. vs. *Park*, 129 Cal., 437, (August 3, 1900).

San Diego Flume Co. vs. *Souther*, 90 Fed. Rep., 164, (Oct. 2, 1898).

Ibid, on re-hearing, 140 Fed. Rep., 706 (Oct. 25, 1900).

The authorthy of the decisions of the Circuit Court of Appeals was, of course, recognized in the case in which it was rendered, by the Circuit Court, when the case was returned to it for re-trial.

Souther vs. *San Diego Flume Co.*, 112 Fed. Rep., 228 (Dec. 9, 1901).

But in the case now before this Court the able and honored circuit judge in his opinion, not being constrained by the opinion of an appellate court in the case before him, again combats the conclusion of the Circuit Court of Appeals and seeks to show that under the facts involved in *Fresno Canal Co.* vs. *Park*, 129 Cal., 437, *supra*, that decision is not authority for the proposition that, under the state constitution of 1879, water-rights can be created under this Sweetwater system by contracts.

Opinion of Circuit Court, Record, pp. 53-57.

With great deference, we submit that the court below fell into certain misapprehensions respecting the case in 129 Cal., *supra*, which invalidates its criticism upon it.

Thus it is said in the opinion (Record, p. 56):

"It did not appear in that case that the appropriator exacted any sum of money or other thing, as a condition precedent to the right to use the water in addition to the rates to be lawfully fixed for its use * *."

By this, the court meant to say, that no lump sum had been paid for the water-right.

But the quotation made by the Circuit Court (Record, p. 55), from the opinion of the State Supreme Court, shows

that this is a misapprehension. The passage quoted, so far as material, is as follows:

"The respondent in consideration of a *certain sum of money then paid it*, by Perrin, covenanted to furnish to the latter from its main canal, * * * all the water required for the irrigation of a described piece of land. * * * * * * * * * * * * It was declared that the water to be furnished was intended to be an appurtenance to and to run with the land, etc. * * * * * * * * * * * * Perrin covenanted for himself * * * * * for the payment annually to the respondent for the sum of one hundred dollars * * * * *."

That under this contract Perrin paid down a lump sum as the price of his water-right and in addition made an executory agreement to pay an annual rate of one hundred dollars, is further shown by the declaration in the opinion 129 Cal., at page 440, that the contract in question there was "exactly like" that set forth in *Fresno Irrigation Co.* vs. *Dunbar*, 80 Cal., 530. Examination of the form of contract in the 80 Cal., so referred to, shows that it was a conveyance of the water-right for the price of $1,200.00 *paid*, together with an executory agreement to pay a further annual sum of $400.00 for a specific number of years.

Again, the contract in the case 129 Cal., *supra*, was made March 28, 1892, after the Constitution of 1879, and so far forth was subject to it.

Also, the time when the water was appropriated by the Fresno Canal Company from or upon the natural stream, was entirely immaterial, whether that was before or after the adoption of the Constitution of 1879; this is true because the term "appropriated" as used in the constitutional phrase "appropriated for sale, rental or distribution"

means, as decided in *Merrill* vs. *Irrigation Company*, 112 Cal., 426, 432-3, simply *devoted* to such public uses.

See citations of this case in *San Diego Flume Co.* vs. *Souther*, 90 Cal., 164, 169, on this point.

It would add indefinite complications, to those already too numerous, to import new distinctions in the operation of the constitution and laws respecting water and water-rights, based upon the consideration of whether the corporations which control the water supply, diverted water from streams before, or after, the adoption of the constitution of 1879.

We have ventured upon these suggestions because of a sense of the unfortunate and most injurious consequences of any doubt remaining upon so vital a subject as whether voluntary purchases and conveyances of irrigation easements in a water system, confer the ordinary rights of ownership which follow from such executed contracts.

If such contracts were indeed of no validity, then this company cannot sell another foot of land as irrigated land, and it must forego at least five-sixths of the price it would otherwise realize from its lands irrigable from the system.

So, also, all who have purchased land and water from the corporation would at once be divested of as much as five-sixths of the value of their property; the same would be true of all those who bought water-rights annexed to their lands; and so of all those to whose land the corporation has many years ago voluntarily annexed water-rights upon the same footing with irrigated lands owned or sold by it.

On the other hand, if such contracts and conveyances

are valid, and if the evidence in this case shows that water-rights have vested in the irrigators of land under this system pursuant to purchase or its equivalent, then it seems clear that in the investigation here by this court for itself, of the constitutionality of the irrigation rate under the ordinance, there is necessarily involved the *relation of such water-rights to any subsequent adjustment of the annual rates by public authority, made on the principle of the resaonableness of the rates.*

It will be remembered that this court decided in *Osborne* vs. *San Diego Land and Town Company*, 178 U. S., 22 *supra*, that there was no contract fixing such annual rates but that they were left to be fixed and refixed by the company, but subject to be finally determined by public authority.

The Statute of 1885, Section 5, provides, and every consideration of justice dictates, that all the facts, circumstances and conditions pertinent to the problem of such annual irrigation rates, be taken into estimation. And the amendment of March 2, 1897, to the Act of 1885 (see Appendix), provides that *nothing in the Act contained* shall be construed to interfere with rights under vested easements of the flow and use of water. This statute was declared in *Fresno Canal Co* vs. *Park*, 129 Cal., 437, *supra*, at pages 447-8, to be "a legislative construction, and as such entitled to consideration."

If the Board of Supervisors erred in its rejection of all considerations relating to acquired water-rights, that does not preclude the settlement here of the true principle in that behalf. For, as was well said by the Circuit Court in its opinion (Record, p. 65), "it must be remembered that it is the result of its (the board's) action as embodied

in the ordinance, that is the subject for the determination of the court, not the processes by which it reaches its conclusion."

It is very true that in this case, the ordinance was sustained and the bill dismissed by the court below without counting, against the contention of the appellant, that the rates were confiscatory, and that its interest in the water system had been undervalued, the fact that the corporation had prior to the ordinance sold or otherwise granted water-rights out of its system to all those who were actual consumers for irrigation at the time the ordinance was passed.

It is also true that we contend that the ordinance is unimpeached by the proofs, even on the theory of the Circuit Court upon which the Board of Supervisors proceeded. It is also true that the irrigators of land under this system, have not attacked this ordinance on the ground that the board ignored their water-rights; it is apparent, so far as that is concerned, that they were contented with the ordinance so long as the rates fixed by the company did not exceed the irrigation rate upon the strength of which they bought and improved their land. But, nevertheless, on behalf of this public, it is respectfully submitted that every legitimate consideration in resisting the attack upon the ordinance and upon the valuation of the interest retained by the corporation in its water system, which was made the basis of the ordinance rate, is properly to be taken into the account. And we may, with propriety, suggest the danger of a precedent in this court which would furnish even negative support to the view that a water company may sell easements of water supply to the full capacity of its system and receive the purchase money

therefor, and nevertheless collect the same net revenue on the whole, or original value of the system, as though it had not sold any interest in it.

What, then, are the facts shown by the proofs respecting the rights referred to in the "Claim and Protest" set forth in the bill? (Record, p. 6.)

It appears that there were sold by the company as irrigated land . . . . . 717 acres
(Record, pp. 362, 577, 413, 448, 450, 451, 453, 455.)

As already referred to, the element of water supply, that is the permanent right to the use and flow of water, which is but another name for an easement in the system, cost such purchasers from $250.00 to $275.00 per acre, amounting in the aggregate to upwards of $180,000.

There were sold water-rights alone, annexed to land not sold by company . . . . . 694 acres

The prices for these water-rights ranged from $50.00 to $100.00 per acre, and at an average of $75.00 per acre brought in the aggregate upwards of $50,000.

Thus the San Diego Land and Town Company of Kansas collected for water-rights sold and made appurtenant to 1411 acres of land, about the sum of $230,000, exclusive of all annual rates.

The great bulk of the purchasers of the 717 acres of land bought from the corporation, purchased before the express contracts for the sale of land and water-rights,

were made under the system adopted after December 18, 1892. (Record, pp. 388, 389.)

The following extracts from the testimony of Mr. Boal, manager of the companies, will illustrate the inevitable union of the irrigated and irrigable land of the company with the water system as one estate, and of the sales of land and water-rights as one estate; and will also serve to illustrate practically the meaning and significance of a water-right.

After having given the prices at which the company sold its lands (Record, p. 355) the record shows the following questions and answers (p. 356);

"Q: Now, Mr. Boal, in the sale of all those lands, is it not true that every purchaser was assured by the company that he would get the water with his land?
"A. It was true."

The witness's attention was called to a statement signed by the then president of the Kansas corporation, which had been distributed and was still being distributed at the time of the witness's testifying, and the following questions and answers follow in the record:

"Q. On page 4 I see this statement: 'As is the case with all the land of the San Diego Land and Town Company, the water is sold with the land and becomes perpetually attached to it.' That is true, isn't it, Mr, Boal?
"A. As I understand it, that is true. * * *
* * * * * * * * * * *
"Q. But the water was an important element, was it not?
"A. It was.
"Q. In the prices of the land?
"A. It was."

(Record, p. 356.)

With reference to the almost sixteen hundred acres of

land cultivated by the company, Manager Boal was asked questions and answered as follows:

"Q. First, let me ask, has the company water-rights annexed to those lands?

"A. It has always treated the water-right as something that whatever it was, passed with the ownership of the land to the purchaser.

"Q. How was it before the land passed?

"A. *Well, there was no question but what the same water-right existed there, and that that land has a water-right.*"

(Record, p. 451.)

* * * * * * * * * * *

"Q. So really the land department of the company is not charged with those water-rights because the company constructed the system?

"A. Yes, I am prepared to say so.

"Q. And the water and the land was all one property, then, so far as the company still continues to own and irrigate its own land?

"A. I think so.

"Q. And where it sold its land, the water and the land went together, didn't it?

"A. I think so. That has been my idea of it."

(Record, p. 451.)

* * * * * * * * * * *

"Q. So, then, a water-right is (the right to) the use of your system, is it not?

"A. It goes back to that; yes, sir.

"Q. And that is what you talk when you sell a water-right?

"A. We certainly mean that the person receiving the water-right shall have the use of our system to the extent of receiving the water that he has contracted for.

* * * * * * * * * * *

"Q. Doesn't it come to that, that is the right to the flow and the use of water through your system?

"A. I think I meant awhile ago when I said that the owner had the right to the use of water, that he has the right from year to year to receive so much water—as I understand it.

"Q. Where, at the dam, or on the mountains?

"A. No, after it has passed through our system.

"Q. So really when you speak about a water-right it is based upon the construction of the system, isn't it, and the use of it?

"A. It certainly represents a part of the capacity of that system.

* * * * * * * * * * *

It is the right to the use of so much water and the obligation of the company to deliver so much water to the person using it—it must be that.

"Q. Through the system?

"A. Through the system.

"Q. Now when you talk about the obligation of the company to deliver, is that anything more than to keep the pipes in repair and the dam in repair and let the water run?

"A. That would be one of the obligations surely.

* * * * * * * * * * *

"Q. It works by gravity doesn't it?

"A. That is the operation of it.

* * * * * * * * * * *

"Q. Isn't it to the whole extent self-operating when kept in repair?

"A. Well, I conceive that the whole company has certain duties to perform in the operation of the system * * * in a system that is in absolutely perfect repair, the company still has certain things to do.

"Q. In the way of management, isn't it, to use a statutory phrase?

"A. In the way of management, and in the way of regulation of the supply of water at the dam, it might be.

* * * * * * * * * * *

"Q. Mr. Boal, your estimate speaks of the value of a water right of $100 an acre. Will you state what elements enter into that estimate of the value of a water right?

"A. There has been a number of theories advanced.

* * * * * * * * * * *

"Q. Did your company as a matter of fact exclude all

consideration of the cost of the construction of the system from this valuation of a water right?

"A. *I think that the cost of the system was one of the elements in mind by the company.*

"Q. Now, was there any other element?

"A. There might be the element of what it is worth to the purchaser receiving it, what he would be willing to pay for it.

"Q. That then would be the increase or profit of the company over and above the cost of construction, wouldn't it?

"A. What do you refer to when you say 'that?'

"Q. When you say there is an additional element to the cost of construction, that additional element is simply the profit to the company—wouldn't it be?

"A. That might be it, yes.

"Q. And to a reasonable extent that is legitimate, in your judgment—wouldn't it be?

"A. Yes."

Record, pp. 453-454.

* * * * * * * * * * * *

"A. I understand that the purchasers of a water-right, or the owner of a water-right, however acquired under our past practice, has the right to the use of his proportion of the water that is stored from year to year by the company * * *."

Record, p. 455.

Prior to December 19, 1892, the Kansas company annexed water-rights to lands not sold by it without demanding payment of any price for water-rights or any different annual rates from those fixed for lands sold by it to the extent of . 970 acres.

Record, pp. 389, 413, 448, 450.

Strange as this policy may now seem, as long as it lasted, it made it possible that non-company lands should sell at equal prices and in competition with the lands and

appurtenant water of the company itself. At least a partial explanation of this anomaly seems to be, that the agents of the company engaged in buying and selling outside lands together with the company's water, that is speculated at the expense of the company's water system, until the company very properly stopped this policy in the fall of 1892.

Record, p. 389.

The result of this voluntary, but exceedingly unwise policy, was that these lands became entitled, under Sec. 552 of the Civil Code, to their easements of the water supply on the same terms as to annual rates with those sold by the company. This was, however, the voluntary act of the company; and so the company has always treated them and still continues to treat them. They are recognized by the tenth paragraph of the Rates and Classification adopted by the company to take effect January 1, 1896. (Record, pp. 562, 564.)

That paragraph contains the following:

"*Tenth.*

"For the purpose of fixing rates for irrigating acre property the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation purposes has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

No distinction, as shown by the succeeding portion of this tenth rule, is made as to the annual rate between the two classes. But as to the lands thus assigned to the

second class, the following provision is made (Record, p. 564):

"In addition to said annual rate for water used upon lands of said second class there shall be paid upon the lands of said class, an annual charge equal to six (6) per centum of the value of the right to said easement, and flow of water for irrigation, which said value is to be taken as one hundred dollars ($100.00) per acre.

"The domestic rates on acre property shall be in addition to the charge for water for irrigation."

As further showing the obliteration in the practice of the company, of all discrimination against lands to which prior to December 18, 1892, it had voluntarily annexed water-rights without the payment of any price therefor, between such lands and its own lands, we quote further from Manager Boal's testimony (Record, pp. 356-357):

"Q. Has the company ever made any discrimination in the rates between the land it itself owns and irrigates from its system as to irrigating rates, and the lands which it sold?

"A. Not that I know of.

"Q. The present San Diego Land and Town Company of Maine bought the water system and the lands of the company all in a lump, didn't it, at public sale held at the Land and Town Company's office June 14th, 1897?

"A. Yes it was bought by a committee representing some sort of a body.

"Q. That committee represented the present San Diego Land and Town Company of Maine?

"A. Yes.

"Q. And where that company is irrigating its own land now owning the water system and the land, it charges itself up with the same rate as it does the people who have bought lands of it?

"A. It does.

"Q. *And also the same rates that are charged to people to whom the company voluntarily furnished water where they did not buy the land from the company?*

"A. Yes."

* * * * * * * * * * *

"Q. Does the company make any discrimination at all between the claim for rates from people to whom it has given these express water-rights since 1893 (1892) and those to whom it sold land at that time?

"A. It makes no distinction.

We submit that it is apparent that it is too late now, after from ten to fifteen years of this voluntary obliteration of all distinction between these lands and those sold with the water by the company, to raise any discrimination in respect of the annual rates. Indeed, such discrimination is forbidden by Sec. 552, Civil Code. (See Appendix.)

The change in the policy of the company after December 18, 1892, is shown by the following:

In the Rules and Regulations adopted by the company (Record, p. 566), the Rule XIII (ibid, p. 568) contains the following provision which, affects those who have not acquired their water rights:

"1. This company supplies water for uses of two distinct characters, to-wit: 1st, for domestic and kindred purposes; 2nd, for the irrigation of lands used for the purpose of raising crops. The furnishing of water for irrigation involves, in some cases, the conveyance by this company and the acquirement by the land irrigated of a right to the easement and flow of water for irrigation, known as a water-right. This said right to the easement and flow of water for irrigation (and consequently water for irrigation) *will not be sold or conveyed* (*or water for irrigation be furnished*) by the company or acquired by any consumer or consumers, except upon payment to the company of $100.000 per acre for said right, or of an annual interest charge of six per cent. on said amount, as the company may elect."

And that this policy is still continued on the part of the company, as shown by the testimony of Manager Boal (Record, pp. 358, 359):

"Q. Do you exact a contract from the purchaser of land, or from any outside land that demands water, to pay for a water-right conditionally?

"A. We do exact a contract.

* * * * * * * * *

I can say generally what it contains.

"Q. You may state generally what it does contain?

"A. It was a contract in the same form as the one that was handed me a few minutes ago, in which we add the provision that the land-owner may either pay the principal charge of $100 an acre, or an interest charge thereon of six per cent. per annum at his option, beginning when the courts of competent jurisdiction decide that it is a proper charge for us to make, otherwise there is nothing collected of him.

"Q. That $100 an acre that is conditionally contracted for, is in addition to annual rates?

"A. Yes, sir."

* * * * * * * * * * *

"Q. Mr. Boal, isn't it true that the company claims that it of right ought to have the right to charge new lands for water-right?

"A. We have made that claim in two suits.

"Q. Are you not practically asserting it by compelling people to make these contracts before you give them water?

"A. We are saving to ourselves the right to collect that, in case we have that right.

* * * * * * * * * * *

"Q. And is it not true that your company has adopted the policy that they will not furnish any water to any new land the owners of which will not enter into this additional water-right contract unless they are compelled to do so by a suit of mandamus?

"A. Yes, sir.

"Q. You take that position to protect the company, do you, now?

"A. Yes, sir."

This form of contract which the company adopted to meet the contingency referred to therein, is shown in the Record at pp. 559, 560, 561.

See, also, the express concession by counsel for appellant, of the ownership of their water-rights by the consumers of water for irrigation wherever the water had been voluntarily furnished to their lands.

Record, p. 333.

From the proofs to which reference has been made, we submit that it clearly appears that the Kansas corporation had, prior to the ordinance here under examination, transferred to the irrigators under its system permanent water-rights for irrigation of their respective tracts of land.

The full contract price for about sixty per cent. of these water-rights had been paid to the company; and by the voluntary act of the corporation the owners of the remaining forty per cent. of these water-rights had, for more than ten years since, been put, in respect of the terms to which they were entitled to the continued enjoyment of such rights, in a position not less favorable than those who had bought and paid for their rights. (See Sec. 552, Civil Code, Appendix.)

These water-rights are nothing less than *freehold estates* carved out of its system by the company and conveyed to the respective land-owners. In *Wyatt* vs. *Laramie & Weld Irr. Co.*, 18 Col., 298, 33 Pac. Rep., 144, it is said:

"The plaintiffs allege a right to have a certain quantity of water flow through the irrigating company's ditch. *This right is an easement in the ditch.* It is a right annexed to the realty, and being a perpetual right, is an incorporeal hereditament descendable by inheritance to plaintiffs' heirs, and hence a *freehold estate.*"

This conclusion was adhered to upon a re-hearing, and this language was quoted and re-affirmed in *Grand Val. Irr. Co.* vs. *Lesher* (March, 1901), 28 Col., 273, 65 Pac. Rep., 44, 47.

To the same effect is *Empire Land and Canal Co.* vs. *Board of Commissioners*, 20 Col., 244, 40 Pac. Rep., 449, 451.

As to the freehold character of perpetual easements, see

Nellis vs. *Munson*, 108 N. Y., 453, 460, 15 N. E. Rep., 739;

Pinkham vs. *City of Euclaire*, 81 Wis., 301, 51 N. W. Rep., 550, 553;

Branson vs. *Studebaker*, 133 Ind., 147, 33 N. E. Rep., 98, 103-4;

Civil Code of California, Secs. 658, 662, 801, 806, (Appendix);

Ibid, Sec. 552 (Appendix);

Act of March 2, 1897, made Sec. 11½ of the Act of 1885 (Appendix).

As respects the irrigation easements which passed by sale and conveyance by the company of the land described by it (Record, p. 577) as "irrigated fruit and farm lands covered with water mains," without express mention of such easements in the deed, see:

Cave vs. *Crafts*, 53 Cal., 135;

Farmer vs. *Ukiah Water Co.*, 56 Cal., 11;

Standardt vs. *Round Valley Water Co.*, 77 Cal., 399;

McShane vs. *Carter*, 80 Cal., 310;

Crocker vs. *Benton*, 93 Cal., 365;

Clyne vs. *Benecia Water Co.*, 100 Cal., 310, 314;

Smith vs. *Corbit*, 116 Cal., 587, 591.

The case last cited quotes and relies upon Sec. 3522 of the Civil Code, which is as follows:

"One who grants a thing is presumed to grant also whatever is essential to its use."

See also Sec. 1104 Civil Code, copied in appendix.

That these easements for irrigation are interests in the real estate constituting the water system, was argued in the brief for appellants in *Osborne* vs. *San Diego Land and Town Co.*, 178 U. S., 22, from page 94 to 121 of the brief, more fully than we can hope to do here.

Inasmuch, then, as the highest court of the State has settled the contention over the question of the validity of such contract relations between irrigating companies and land owners in favor of the right, the inquiry then recurs whether in all questions over water rates established by public authority *after such easements have vested*, respect must not be paid to such easements.

We submit that it is at once apparent that in estimating the value of the interest retained by the corporation in the system, out of which it has carved, so to speak, and conveyed such free-hold irrigation easements, there comes in an element which does not exist in the railway rate cases.

Freehold easements in railroads do not exist in shippers or travelers upon them.

But it is equally certain that they *do* exist in this water system as respects irrigation, and that both the statute and decisions of the State of California recognize them.

It is perhaps true that the company retains all the interest in the system which pertains to the domestic supply; and that the value of this interest is entirely retained by the corporation; but not so as respects these irrigation easements which have been conveyed.

We submit that upon no possible ground can the position of counsel for appellant, expressed in their brief for

the appellee in the case of *Osborne* vs. *San Diego Land and Town Co.*, 178 U. S., *supra*, be maintained. In that brief counsel say (p. 6):

"The acquisition of that water-right has no effect whatever on the liability of the consumer to pay the annual rates, *or the amount to be paid.*"

And on page 3, *ibid:*

"Whether a contract for a water-right was valid or not has nothing to do with the liability of the consumer to pay annual rates, *or the amount to be paid.*"

The testimony illustrates the fact that the price of the water-right was based upon the cost of the construction of the system, together with a reasonable profit in addition. But the theory of counsel above referred to, is otherwise.

General Manager Boal was inquired of, by way of illustration, respecting a certain grant of a water-right to ten acres of land for which one Howe paid to the company five hundred dollars. The questions and answers are as follows (Record, pp. 357-358):

"Q. This then Mr. Boal, was a grant of a water-right for ten acres of land for which Mr. Howe paid $500.00?

"A. Yes, sir.

"Q. Do you claim the right to charge Mr. Howe any rate of interest on the cost of the system for the use of water for the irrigation of land to which this water-right has been annexed by this conveyance?

"A. The water-right contract does not show that he paid for anything except the right to take the water from our system, and that he acquired no other right than that by this water-right contract.

"Q. What was this $500.00 charged for, then?

"A. It was a part compensation for doing what was necessary to get water—to bring water to his land I should say.

"Q. That is, it was on account of construction of the water system, is that it?

"A. That would be one construction of it, *another would be that it was in the nature of a bonus.*

"Q. A bonus for what?

"A. For the development of water.

"Q. A sort of public-spirited donation to the Land and Town company?

"A. Not necessarily. As it proves, it is a charge that we were not authorized to make by the laws."

The theory of counsel, as above stated, descends to the "bonus" theory. The bitter attack made, shown by the record and in appellant's brief upon the attempt before the Board of Supervisors to present in some effective way the merits of the case of these owners of easements, and to preserve in the record some measure of presentation of their situation, is inspired by the "bonus" theory.

If the charges, freely indulged in, of deception practiced upon the Board of Supervisors, of which we are authorized to say the board are not conscious, and which they have not commissioned counsel for appellant to make for them, and concerning which there is no allegation in the bill, shall only challenge the attention of the Court to this "*bonus*" theory, we shall have no occasion to regret the attack.

We cannot resist the conviction that the hostility of the learned Circuit Judge to "water-rights" under such an irrigation system, is owing to the revolt of his strong sense of equity and justice against this bonus theory of water-rights, with which counsel for appellant presented him in the first instance in the National City case and have insisted upon throughout the whole history of the litigation which this company and its predecessors have forced upon rate-fixing bodies and consumers under this system.

This same "bonus" theory was subsequently and con-

sequently forced into litigation under other water systems throughout Southern California; and the result has been one of incalculable disaster. Judge Ross' first occasion to deal with this bonus theory was in *San Diego Land and Town Co.* vs *City of National City*, 74 Fed. Rep., 79, 80. That case was determined on appeal by this Court (174 U. S., 739) and in its opinion, page 759, is a judicial statement of this bonus theory as follows:

"The appellant asks, among other things, that it be decreed to be entitled to charge and collect for 'water-rights' at reasonable rates *as a condition* upon which it will furnish water for the purpose of irrigation, notwithstanding the rates fixed by defendant's Board of Trustees for water sold and furnished within the city."

Counsel in that case, anticipating the question which must involuntarily arise in the judicial mind, whenever *after* payment for a water-right, the question of the effect of such purchase and payment upon the annual rates to be fixed by public authority comes up, said, as quoted in the opinion of the court (174 U. S., 759):

"Whether in fixing the annual rates to be charged, the body authorized to fix them can take into account the amount that has been received by the company for water-rights, is another question, and one not presented in this case."

When the next case, that of *Lanning* vs. *Osborne*, came before the same Circuit Judge, he defined this "bonus" theory (76 Fed. Rep., 319, 333), as the claim to a right "to exact any sum of money or other thing, *in addition to the legally established rates* as a condition upon which it will furnish to consumers water so appropriated."

In *Souther* vs. *San Diego Flume Co.*, 112 Fed. Rep., 228, 230, the same Judge, after referring to the prior de-

cisions of the Circuit Court of Appeals overruling the Circuit Court in the same case, says:

"So that it must be by this Court now considered and held that when the cross-complainant made its appropriation of waters upon the public land under and by virtue of the provisions of the Constitution of California of 1879, and of the Statutes of the State passed pursuant thereto, for sale, rental and distribution, it thereby acquired such title to the water so appropriated as to enable it to *withhold its use from any and every person who would not comply with its exaction of a price to be paid as a condition precedent to the right of such person to use the water*, IN ADDITION TO SUCH RATES AS MIGHT THEREAFTER BE LEGALLY ESTABLISHED BY LAW FOR ITS USE, notwithstanding the provision of the Constitution of the State declaring such waters so appropriated charged with 'a public use.'"

Thus the learned Circuit Judge concludes, with evident regret, that the result of the decision of the Appellate Court is to fasten upon the people of this State the "bonus" theory of water-rights, so dear to the appellant.

We say "with evident regret", for notwithstanding what is above quoted from his decision in the 112 Fed. Rep., he, from sentiments which do him all honor, returns to the attack upon that theory in the opinion in this case, in which he defines it (Record, p. 57) as the claim of the right "*to exact a sum of money or other thing, in addition to the legally established rates.*"

This bonus theory is justly stigmatized no less than seven times in the opinion of the Circuit Court, in the record, as an "exaction." (Record, pp. 53, 54, 56, 57, 58.)

An exaction it would be of the most inequitable and outrageous kind, if the contention of counsel for appellant above referred to, and stated to this Court concerning

these water-rights, for which, as shown above, some $230,000 have been paid, is true, to-wit, that:

"The acquisition to that water-right has *no effect whatever* on the liability of the consumer to pay the annual rates, *or the amount to be paid.*"

This is a complete definition of the principle upon which this bill is founded. To establish this, has been the object of the whole litigation, which commenced with the case of *Lanning* vs. *Osborne*, in January, 1896, and has now reached this Court a second time; it was also the object of the suit against National City, which reached the Court.

The people who have acquired these water-rights have suffered a peculiar irony of fate. The matter of water-rights, that is of easements of the flow and use of water, under this irrigating system, was first, as above shown, presented to the Circuit Court by appellant's predecessor, as a claim of the right to a pure, unrelieved *exaction*, for which nothing was to be given in return. (74 Fed. Rep., 79, *supra.*)

This unrighteous demand was met by the court below with the theory of absolute state control, prohibiting all contracts concerning water-rights and water-rates. (74 Fed. Rep., 79, 86, *supra.*)

Then when the people, who had bought and paid for, or otherwise acquired, their water-rights, were haled into the court, and pleaded their acquisition, they were met by the barrier which was originally built against the wrongful attempt to exact money under the "bonus" theory, and their rights went down in defeat.

(76 Fed. Rep., 319, 329, 333, 338-9, *supra.*)

Then came the decision of the Appellate Courts (129 Cal., 437, *supra*; 90 Fed. Rep., 164, *supra*, and 104 Fed. Rep., 706, *supra*), that contracts for the purchase of water-rights and for water-rates were lawful, and that the corporation could collect the amount contracted to be paid upon such consideration.

And now the Circuit Court regretfully construes these decisions as having authorized the companies to exact a price for water-rights and, notwithstanding, to demand the fixing of rates by public bodies without regard to the prior acquisition of such rights, and the making of the rates sufficient to yield net revenue in addition to all expenses of repairs, management and operation, on the whole value of the system, without abatement for water-rights granted out of it, at not less than six nor more than eighteen per cent. per annum.

Is not this an unendurable basis for building up communities on irrigated land in Southern California?

We submit that some relief ought to be afforded in the courts of appeal by way of readjusting the unfortunate state of things resulting from the decisions as above referred to.

The remedy for the confusion and against further disaster is simple and clear. It is this: That where water-rights have vested pursuant to a purchase or its equivalent, all rate-fixing bodies *afterward* sitting to adjust annual rates, shall adjust them to such vested property rights in the system.

Where the basis of rates for net revenue is made the value of the system as a whole, then he who has paid his share of construction by buying his water-right for irriga-

tion, ought to be, and is exempt from further payment of rates for net revenue on what he has already bought, paid for and owns.

If the legislation of this state be examined, it will be seen that it has paved the way for the application of this simple principle, that he who has paid for his water-right, that is, for the flow and use of the water through the system for his land, cannot be made to pay for it again in irrigation rates to yield net revenue.

He must pay his annual rates for repairs, management and operation of the system.

He must pay his domestic rates, if his water-right for irrigation does not cover domestic use. But the right he has bought and paid for, cannot be taken away from him or disregarded by making him pay over again for his share of the construction, in rates.

The Amendment of 1897 to the Statute of 1885, inserting Sec. 11½, declares that nothing in that Act contained shall interfere with vested rights under contracts for the sale of easements and servitudes of the right to the flow and use of water.

By an amendment to Sec. 5 of the Act approved February 28, 1901, the following provision was inserted in order to facilitate the adjustment of the operation of an ordinance fixing rates to these vested rights, as declared by the Section 11½, by requiring the Board of Supervisors to designate what proportion of the ordinance rates should be for annual expenses, and what proportion for net revenue.

The portion inserted in the Section by the amendment is as follows (Laws of 1901, p. 81):

"And each such Board of Supervisors shall designate what proportion of the rates so fixed shall be for the said annual reasonable expenses of each of such persons, companies, associations or corporations, and what proportion of the rates so fixed shall be for the said net annual receipts and profits to such persons, companies, associations or corporations."

Under this amendment those who have acquired their easements in freehold will automatically fall under the head of those who, *as respects irrigation*, pay only the proportion or the irrigation rates for repair, management and operation.

Those who avail themselves of the public use of the system for irrigation, without having acquired a freehold water-right, or irrigation easement, must pay the whole rate for net revenue as well as for maintenance. They will also automatically fall into their appropriate class.

This statute, it will be observed, has made it feasible to adopt the essential principle of the tenth paragraph of the rules relating to classification, adopted by the company itself. (Record, p. 564.)

This will do complete justice to all parties. Under its operation the company can realize on its water system, and with the concurrence of the consumers eliminate the element of net irrigation rates and the continual worry over them. It can sell its lands as irrigated lands and realize the original intention in that behalf. On the other hand, the irrigator of land can unite his title to land and water supply by the purchase of his easements, and with it buy peace from rate-wars; this peace is a potent psychological factor in the prosperity of the company and consumer.

When this ordinance was passed, October 16, 1897, al-

though Section 11½, the amendment of 1897 to the Act of 1885, was in force, the amendment of 1891 to the Section 5 of the Act was not in force; and so, as the Act then stood, there was no practical way pointed out by the statute for adjusting the application of the rates fixed by the board to the vested easements for irrigation; as the Act then stood, the rates for maintenance and net revenue were left to be combined in one, and fixed *in solido*.

So the acreage rate of $3.50 per annum fixed by the ordinance, covers both the purposes of maintenance and net revenue. Yet it appears that all the land-owners, irrigating under the system, own their water-rights; notwithstanding that fact, they have paid the whole irrigation rate for both purposes. Fortunately that rate under the ordinance, does not exceed what they had always paid; so they have submitted to it and been content with it.

But since the appellant seeks to overthrow the ordinance and enforce its own rate of $7.00 per acre per annum, we respectfully submit that as bearing upon the reasonableness in a constitutional sense, of the ordinance rate, this Court ought to hold that the acquisition of these water-rights in the way they were acquired, is a proper element to be taken into consideration.

We submit that now after the Supreme Court of this State has maintained water-right contracts, the owners of irrigation easements under this system are entitled in this case to have their rights set at rest to this extent, at least, that it be held that the fact of the existence of their freehold easements is a proper element to be regarded when rates fixed by public authority after the vesting of these water-rights are attacked, as they are here.

We most respectfully submit that the "bonus" theory of water-rights, that is to say, the theory that after having sold and conveyed water-rights for an agreed price, the company is entitled to have rates, not only for maintenance, but also for as much net revenue as though it had not sold or otherwise granted the easements, should at last receive its quietus at the hands of this Court.

For where can the owners of these easements look more appropriately for protection than to this Court—the peculiar guardian of vested rights.

In the decision of the case of *Osborne* vs. *San Diego Land and Town Company*, 178 U. S., 22, *supra*, this Court did not determine the ultimate relation between a vested easement of water supply for irrigation under one of these systems, and the subsequent fixing of annual rates. In that case, for the time being, the decision left the fixing of the rates to the volition of the company, holding any inquiry as to the reasonableness of any rate it might fix to be unseasonable in that stage of the controversy.

The remedy against unreasonable increases of rates by the company in the exercise of its pleasure, the court held must first be sought before the Board of Supervisors; and could come under judicial examination only when an action was brought to test the work of the board.

The decision of this Court in the Osborne case, therefore, merely postponed the decision of the question, as to whether vested water-rights may be disregarded when the public rate-fixing body makes a schedule of rates, until such action is subjected to judicial examination.

The company claim here in a case so framed, that in fixing the amount of the irrigation rate, such easements, however acquired, are to be disregarded.

We respectfully submit that this cannot be true either in obedience to Section 11½, embodied in the Statute of 1885 by the Amendment of 1897, or, under the principles which it declares, or under the Fourteenth Amendment to the National Constitution.

And we submit that this is all the more plain since the contracts out of which such easements arise, have been expressly sustained by the State and Circuit Appellate Courts, and the opposing idea explicitly overruled.

OBSERVATIONS TOUCHING CHARGES BY COMPLAINANT OF DECEPTION PRACTICED ON THE BOARD OF SUPERVISORS.

A matter altogether besides the merits is forced into prominence by the course which opposing counsel have seen fit to pursue in this case throughout.

Charges of deception practiced upon the Board of Supervisors, and the like, abound in the printed brief; but, there is no allegation of this sort in the bill of complaint.

That bill virtually charges the Board of Supervisors with having, with a direct purpose, violated the express provisions of the statute, and of having been guilty of arbitrary and unjust conduct in passing its ordinance.

Under the proofs, however, this charge at once evaporated.

So appellant's brief improvises a new theory—that the Board of Supervisors were the victims of deception; and thus from being accusers of the board, counsel for appellant *per saltum* constitute themselves the self-styled champions of the board against a purely imaginary grievance.

The appellees, the members of the board, are not aware of any deceit practiced upon them in any part of the proceedings. Inasmuch as the board heard all parties and weighed all the evidence adduced, and since it knows of no evidence suppressed or concealed, it does not know how it can make any use for itself, or the public, of the services of counsel for the company in their attack upon the result of the board's deliberations, for the supposed want of "good faith" of any parties, or for "deception" alleged to have been practiced upon it.

The District Attorney of the county, appearing for the board, has no instructions to avail himself of the aid of counsel for the complainant in behalf of such charges.

The whole subject, so far as the board itself is concerned, might safely be left by the appellees to rest upon the presentation made in the opinion of the Circuit Court on this point. (Record, p. 62.)

But it is no more than fair to the parties charged with collusion or fraud, who are represented by the board, to make the following observations:

After correcting certain mis-statements of law and fact, we shall in this matter give counsel, subject to such corrections, the benefit of the extremest implications they draw from the evidence which they claim supports these charges.

It is reiterated in the brief with much frequency, that the petitioners to the board *had no interest in the fixing of rates.*

This is neither true as a matter of law, nor is it shown to be true as a matter of fact.

It is not true as a matter of law ; for since the right to

share in the use of this water is public; and since there was believed to be (in prospect) an adequate supply for new users for irrigation and other purposes; and since, as is conceded, all the petitioners were inhabitants and taxpayers of the county; and, therefore, qualified petitioners, it cannot be correctly said that *they had no interest in fixing the rates.* As the Circuit Court said in *Lanning* vs. *Osborne*, 74 Fed. Rep., 319, 339:

"The complainant, being in charge of a public use, in the management of it, does not act for the defendants alone, but, to the extent of the capacity of the system to furnish water *for all of the public who are, or may be*, situated within its reach."

See, also, Sections 1 and 10 of the Act of 1885.

Nor is this shown to be true as a matter of fact (if such inquiry is indeed material).

It only appears, and that was clearly and openly stated at the very outset of the hearing before the board, that none of the petitioners were then, or had been, consumers of water under the system, at irrigation rates. (Record, pp. 266-7.) The terms of the protest itself show this.

One of the counsel for appellant was doubtless correct in saying (Record, p. 8), that some of the petitioners were from the Otay section and purchasers of water "at so much a thousand gallons delivered in bulk."

It appears that one petitioner, whom counsel, who is especially attacked here, procured to sign the petition to fix rates, while not then a consumer, had land under the system, and desired, and had desired, water under the system to irrigate it. And as for the other petitioners, there is nothing to show that they did not, or that they do not, or that they will not desire to avail themselves of any of

the varied uses of water under this system, subject, of course, to the condition for which they are not responsible, to-wit: that at some time the company may have a water supply again for anybody. It does not appear but that some may have waited for the fixing of rates by the board, before making themselves dependent on the system.

Surely, since they were inhabitants and tax-payers of the county, and therefore declared by the statute to be qualified petitioners, the law will not presume that they had no interest in fixing of the rates.

Since these petitioners concealed nothing as to their true character; since they exercised but a legal right, how can they be properly, or even decently, charged with want of good faith in signing and filing this petition, or in being separately represented by Messrs. Shaw and Trippet as counsel before the board?

As was said in *Pehrson* vs. *Hewitt*, 79 Cal., 594, 588:

"*There can be no fraud in the pursuance of a remedy allowed by law.*"

Nor, as held in that case, is the procuring another to pursue such a remedy, which he has a right to pursue, a fraud.

Having made these corrections, and subject to them, let the extremest facts shown, or claimed to be inferable from the evidence, be assumed, for example:

That the counsel for the actual consumers impleaded in *Lanning* vs. *Osborne*, drew the petition to the board; that they procured one or more persons who were not actual consumers of water under the system, but who were inhabitants and tax-payers of the county, to sign the petition; that others of the defendants in that action pro-

cured other such qualified persons to sign; and that the body of consumers under the system arranged to pay and did pay the compensation of Messrs. Shaw and Trippet, as special counsel, to appear before the board for the petitioners, out of a general fund contributed to defend in any proceeding in which the Land and Town company should be an adverse party to water consumers.

Also, that, although the defendants in the named action desired that jurisdiction to fix rates for this company should be taken by the board to test the question whether the seven dollar rate demanded in that suit was reasonable upon any view, yet that they did not desire to be petitioners, because that would seem, in view of the decision of the Circuit Court (since overruled), to be abandonment of their position as claimants to the ownership of water-rights in fee under the system, for which most of them claimed to have paid the full price; but that these people preferred to have other qualified persons be the petitioners, so that the defendants, by their own separate counsel, might present their case before the board, by their protest against the fixing, in addition to domestic rates, of any irrigation rate for them, other than for repairs, operation and management; and in order that if the board should, upon the claim of the company, fix rates upon anything like the basis and to the amounts demanded by it, such defendants should be free to attack the ordinance in the courts for depriving them of their vested rights.

Let it be further assumed that nothing of all this was shown to the board or notified to the water company, except as it appeared on the face of the petition and of the protest, and as stated in the opening, and as appeared in the progress of the proceedings before the board.

It was a patent fact, in no wise concealed, that the petitioners by their counsel, and the defendants to the named action, by their counsel, made before the board a common cause as respected every question, except the claims of such defendants based upon their alleged water-rights.

What was there not communicated to the board, which could properly affect its jurisdiction or duty to hear the evidence and the parties, and fix rates for the use of water furnished to the public?

There was manifestly nothing. The petitioners had a right to petition; this is conceded in the brief for appellant, p. 14; the claimants and protestants had a right, as parties interested, to state their case as they saw fit; under the statute any other inhabitant of the county who had a present or prospective interest, was entitled to appear in the proceeding and be heard; the company exercised its right to state its position. All that any of them had to offer by way of proof or argument was heard. When all was done it was the board's duty to fix rates, which it did upon its own view of the law and facts, upon consideration of all the evidence. And so far as we can see, it was no concern of anybody's, but the parties themselves, how the attorneys were paid.

The Circuit Court had not then (Oct. 1897), rendered its decree in the case of *Lanning* vs. *Osborne;* it had, it is true, rendered its opinion upon exceptions to the answer; and, as already suggested, it seems to us that the opinion of this Court in *Osborne* vs. *Land and Town Company of Maine*, has served to leave open the question as to the nature, validity and effect of these claims to ownership of water-rights, and has postponed and remitted the whole

controversy, to be raised before the Board of Supervisors, and in subsequent litigation upon their action. To plead and argue that the laying of the foundation for bringing these questions to book—by causing the case of the general public to be presented before the board by lawful petitioners and honorable counsel for them, and the case of the claimants of water-rights to be presented by filing of this claim and protest, was—under all the circumstances—something heinous, is worthy of the *opera bouffe*.

It amounts to an intolerant attempt on the part of the appellant, to crush out, by any means, all presentation of the case of the owners of easements of the flow and use of water for irrigation under this system, in its bearing upon the fixing of rates and in the application of rates when fixed, to such owners.

III.

THE BOARD DID TAKE INTO CONSIDERATION THE DEPRECIATION OF THE PLANT IN ALLOWING FOR REPAIRS THE WHOLE LEGITIMATE CLAIM MADE BY THE COMPANY IN THAT BEHALF. AND BEYOND THAT THE BOARD WAS NOT AUTHORIZED TO GO BY THE STATUTE, THE DECISIONS OF THE COURTS, OR CONSIDERATIONS OF JUSTICE.

It is complained, on page 37 of brief for appellant, that the loss of the company by depreciation of its system was not considered by the Board of Supervisors in fixing rates.

Six per cent. per annum is claimed for a depreciation fund on the asserted aggregate of the construction account of the whole pipe line accumulated during ten years; and two per cent. per annum on the asserted value of the dam and reservoir, and this is claimed *over and above all cur-*

rent annual expenses sufficient to keep the system in repair at all times.

The provision of the Statute of 1885, Sec. 4, in that behalf, is that the board shall estimate the "annual reasonable expenses, including the cost of repairs, management and operating such works."

The board allowed everything claimed under that head upon the figures stated in Exhibit 1 under head of general expenses for the year 1897, to-wit: $3,712.14. (Record, pp. 75, 542.)

It is a remarkable fact, as shown by Exhibit 1 of appellant (Record, pp. 128-9, 542), that the books of the company did not embrace these enormous claims for depreciation until the year 1896, when litigation with the consumers under the system began, and that they have appeared ever since.

It is apparent that this claim is purely and simply a speculative one for a sinking fund to be accumulated in the hands of the company against a theoretical and imaginary future necessity of replacing the entire pipe system at an average distance of time of sixteen and two-thirds years; and of replacing the dam and reservoir in fifty years.

(Boal, Record, pp. 113-114, 330, 352-354; Savage, Record, p. 101; Brief for Appellant, p. 41.)

This demand for a depreciation fund in addition to the annual expenses for the actual repairs each year, is a very thinly disguised demand that the consumers should be compelled to pay the cost of the whole system periodically in addition to all expenses for maintaining the same, and

in addition to the claim made in the bill for net revenue upon the whole system.

The term "*repairs*" as used in the statute, is, in contemplation of law, not limited to mending breaks in any given part of the structure, but, also, embraces the making of the actual replacements of parts of the original structure as they are slowly worn out in the service, that is by "*repairs*" the statute means the maintaining of the system in a fit condition for continuous operation. The necessary replacements, of course, are done by way of repairs constantly in progress. This is shown by the testimony; the testimony also shows that in fact replacements of old pipe worn out in the service or damaged by floods, etc., have been made with new pipe and have been made as *repairs* and charged as such into the general expenses of the pipe system.

Mr. Boal was asked and answered the following question on direct examination on part of appellant, based on Exhibit 1, which appears in the record, p. 542:

"Q. Now under the head of general expenses, in the first column of this statement marked Exhibit One, I wish you would explain to the board what is included under that general head?

"A. We include materials, labor, expense of teams and matters of that sort in the care of the pipe system and dam as well—care of the pipe line and dam."

Record, pp. 327-8.

And on cross-examination the record shows the following questions and answers (p. 346):

"Q. Your first item of expense is under the heading of "general"; what is that for the year 1896?

"A. That is $5,000.71.

"Q. What does that cover?

"A. That covers, as I stated in direct testimony, the salaries or wages of pipe-repairers, the material used in repairing pipe, cost of teams used by those repairers, and the keep of those teams.

"Q. Anything on the dam?

"A. And the expenses on the dam.

"Q. What sort of expenses were those?

"A. We maintain a keeper there, and we clean the reservoir from year to year.

"Q. Does this item of $5,000.71 also include *any replacements of pipe* during the year 1896?

"A. Yes, sir; so far as any have been made. There have been short sections here and there.

"Q. So that the $5,000 is really all the actual outlay of the company for repairs and operation of the system outside of its management?

"A. Outside of superintendence, office management, equipment and so forth.

"Q. What do you mean by equipment?

"A. There is an investment, of course, necessary in tools, teams, stables, and matters of that sort.

"Q. Well, the use of the teams is included in the $5,000?

"A. The expense of feeding and shoeing those horses and repairs to wagons would be charged into that.

In the Exhibit One an extraordinary "General Expense" of $29,147.62 is shown for the year 1895. Mr. Boal's testimony relating to this item shows that the practical construction of the term "repairs" by the company included the replacing of old pipe, etc., by new pipe.

"Q. In the year 1895 the expense for repair and operation was $29,147, as given by this statement. What accounted for that unusual amount?

"A. A very unusual flood in the Sweetwater river accounted for it.

"Q. What effect did that have upon the pipe system?

"A. It washed out a large part of it.

"Q. Where?

"A. In the Sweetwater river near the dam.

* * * * * * * * * * *

"Q. That is the great main of the system, is it not?
"A. That is the 36-inch main.
"Q. How far was that washed out?
"A. It was damaged throughout its entire length.
"Q. What distance?
"A. About 1,600 feet, not every part of it was damaged, but here and there a section was, and some parts entirely washed out.
"Q. And what was done to that in the way of repairs?
"A. The pipe that could be repaired was used, and some sections that were entirely destroyed *were replaced by new pipe* and a section of the pipe line was moved from its old location north into the bed rock at the side of the canyon.
"Q. If it had been placed there originally it probably would not have washed out, would it?
"A. It probably would not have washed out.
"Q. So experience proves it would have been wise to have built it there in the first instance?
"A. Yes, sir.
"Q. What about the expense of replacing that and restoring that 36-inch pipe 1,600 feet?
"A. I cannot segregate it from the amount given there. It is included in that $29,000.
"Q. That was a very large part of it, wasn't it?
"A. Yes, I think so.

* * * * * * * * * * *

"Q. Now that was 1,600 feet from the dam. Did you have to replace any more pipe on account of that flood?
"A. There is a section of the 30-inch pipe from the end of the 36-inch pipe that was washed out and had to be relaid, the channel of the river changed considerably.
"Q. How much of it?
"A. I should say 1,500 or 2,000 feet was disturbed."

Record, pp. 368-9.

We submit, that an exaction for a sinking fund over and above annual cost of repairs as provided for in the statute, and as thus practically construed by the company, is unauthorized. It is conceded that there is no basis for it in the statute. (Appellant's brief, p. 38.)

It is expressly repudiated in the decisions of the Supreme Court of this State.

San Diego Water Company vs. *San Diego*, 118 Cal., 556, 582-3;

Redland, &c., Water Co. vs. *City of Redlands*, 121 Cal., 312, 313.

In the latter case it was said:

"In *San Diego Water Company* vs. *San Diego*, 118 Cal., 556, it was held that the interest upon the indebtedness of the Water Company is not a proper item of expenditure to be provided for in fixing the annual rates to be charged and collected for furnishing water to the inhabitants of a city, and the Water Company is not entitled to have rates so fixed as to enable it *to set apart a certain amount each year as a sinking fund for the depreciation of its plant.* The provision of the judgment herein directing that the rates be fixed so as to assure an income sufficient to pay these items, is inconsistent with the principles declared in the San Diego case."

And the judgment was reversed with specific instructions to exclude the item for a Sinking Fund for the depreciation of the plant.

In the 118 Cal., *supra* 582-3, in the concurring opinion of Mr. Justice Garroutte, it was said:

"The theory of plaintiff in this regard seems to be that the life of a plant of this character may be approximated at thirty years, and that a sinking fund of one-thirtieth of its value should be collected from the rate-payers annually and laid aside to be handed to the stockholders upon the sad occasion of its demise, as an alleviating salve to their sorrow. *But such a thing is all wrong, for it results in the consumers of water buying the plant and paying for it in annual installments.* Consumers of water cannot be charged with cost of construction. They are only to pay a fair interest upon such cost; and as we look at this matter, if this three and one-half per cent. is not stowed away in the vaults as a sinking fund to make

glad the hearts of the stockholders upon the expiration of the thirty years, which theory cannot be tolerated for a moment, then it must go into the plant as cost of construction, and, therefore, not chargeable against the consumers. The result of such expenditure is only to increase the valuation of the plant, and to thereby draw from the consumers, an income upon the amount of the investment. If improvements are made in the plant, the cost of these improvements should be charged against the construction account. If repairs are made upon the plant as it stands, as, for example, a new pipe substituted for an old piece of the same size and quality, such charge should be considered operating expenses."

This is an answer to the whole argument made by counsel (Brief, pp. 37-42); and the inconsistency of what is said on page 40 with itself is apparent on the reading.

We think it a waste of time to further argue a position which not only is in the face of the statute and opposed to the explicit decisions of the Supreme Court of the State, but which undertakes to convince consumers that in order to do justice to them they ought to be compelled not only to pay the expense of keeping the system in *repair* and operation, but over and above that to pay six per cent. per annum on the whole cost of the distributing system, and two per cent. on the dam and reservoir to the company, for the replacement of the system as an entirety at some unknown time in the future.

Yet it seems proper before dismissing the subject, to call the attention of the Court to the remarkable fact that with the exception of the heavy expenditure for repairs caused by the flood of 1895, and explained in the testimony (Record, p. 368), and which was due largely to unwise engineering, the claim of general expenses covering the actual cost of repairs year by year (Record, p. 542)

shows steady and almost uniform falling off since the year 1891, when it was $9,377.12.

This seems extraordinary in the face of the enormous claims for depreciation at six per cent. per annum on the whole alleged cost of the pipe system.

When Mr. Boal was interrogated (Record, pp. 367-368) as to this, he responded to a question, as follows:

"Q. Now, how do you account for the reducing of the actual outlay for repairs and operation from year to year?

"A. Our constant aim has been to do this work just as cheaply and efficiently as possible, and if we have made any progress in that direction we are willing that the board should take account of it in fixing these rates."

In allowing the whole claim of the company for rejecting the claim for rates to yield, over and above the depreciation made good by repairs, a sinking fund to rebuild the system at some imaginary future time, which will never arrive, the board not only followed the statute but the principles of law as declared by the Supreme Court, and the obvious dictates of good sense and justice.

IV.

THE CHARGE THAT THE ORDINANCE WILL NOT ENABLE THE COMPANY TO REALIZE ANY PROFIT, IS UNSUPPORTED BY THE PROOFS.

It is charged in the brief for appellant in various forms, that the rates fixed in this ordinance will not enable the company to realize any profit.

It is even asserted that the similar irrigation rate which the company had fixed prior to this ordinance, "was the prime reason for the decrease in value of its plant, if there was such decrease as claimed, and the cause of its insol-

vency, the appointment of a receiver and forced sale of its property." (Brief, p. 30.)

The more considered charges in this behalf, however, are contained on page 50 of the brief, where counsel say:

"But in none of the cases dealing with this important question has it ever been held that rates which do not meet the actual expenses of the company and its loss *by depreciation* are reasonable or just rates, until now. The bill alleged in terms * * * that the rates fixed by the Board of Supervisors would return nothing to the company over and above its operating expenses *and the depreciation of its plant.*"

To get the exact force and meaning of this charge it is necessary to recur to appellant's Exhibit One (Record, p. 542). We take for illustration the year 1896, which was the last completed year prior to the hearing before the board.

The items of depreciation there claimed are based, as above shown, on an annual estimate of six per cent. on the aggregate of the construction account of the pipe system for some ten years, and two per cent. on the like account of the dam and reservoir.

They are as follows:

"Depreciation Sweetwater dam and reservoir	$ 5,874.21
" Pipe Line No. 1	33,337.96
" " " No. 2	4,244.26
Total, ...	$43,456.43

The expenses claimed for the same year, 1896, are as follows. Exhibit 1, Record, p. 542:

"General", which, as above shown, includes *repairs* and *replacements* of the work wherever actually made,	$5,000.71	
"Legal"	1,200.00	
"Office"	2,000.00	
"Water Department"	3,303.02	
"Taxes"	3,444.20	
"Insurance"	7.50	$14,955.43
Total, ...		$58,411.86

This, then, is what the brief means when it complains that the rates "do not meet the actual expenses and its *loss by depreciation*"; and "that the rates fixed by the Board of Supervisors would return nothing to the company over and above its operating expenses and the *depreciation of its plant.*"

But, as above shown, under the decisions in *Redlands, etc., Water Co.* vs. *Redlands*, 121 Cal., 312, 313, 314, and the case therein cited, in which the same contention made by the same counsel as here, was overruled, the estimates for depreciation must be rejected, as well as the abandoned claim for interest on bonds.

Therefore, the $43,456.43 must go out of the account.

It is apparent that this method of assailing the rates will not show them to be unconstitutional.

As to the charge that the $3.50 annual acreage rate will not enable the company to realize any profit, we call attention to the series of annual reports by the board of directors of the corporation extending from the year ending December 31, 1888, to December 31, 1894, six years, showing a balance to the credit of the water department on December 31, 1894, of $49,699.28.

(Record, pp. 530-532.)

This same item of $49,699.28 is shown in the general balance sheet of the company, December 31, 1894, under head of "Liabilities" to the Water Department. (Record, p. 579.)

It is true an attempt is now made to explain away this balance by charging up against it salaries, etc.; but the fact remains that for six years it was represented and treated as the profit account of the water system.

Again, on December 9, 1895, after the company had been placed in the hands of a receiver, the re-organization committee, of which the president of both the Kansas and Maine corporations was chairman, and three directors of the Kansas corporation were members, submitted a "Re-organization Plan and Agreement," found in the record at pages 545-555, which was introduced in evidence by appellant.

In view of the reckless statement from page 30 of the brief for appellant, that the insufficient water rates were the prime reason for the decrease in value of the company's plant "*and the cause of its insolvency, the appointmentof a receiver and forced sale of its property*", we invite attention to the explanation given in this statement of the reasons for the financial trouble of the company.

On page 546 of the record the first item of the cause of trouble is stated to be the decline in land sales.

The next is the payment of $645,000 in dividends. And then on page 547-548 is given this suggestive table for the year 1895.

Operating Expenses.		Income.	
Interest on debt . .	$45,000	Land sales, collec- and interest . .	$15,000
Taxes	22,000		
General Expenses .	12,000		
Improvements and Insurance	2,500		
Water Department. .	8,000	*Water Department*	25,000
Horticultural Department	30,000	*Horticultural Department*	8,000
Railway	30,000	*Railway*	32,000

That is to say:

Net profit, Water Department	$17,000
Net profit, Railway.	2,000
Net *loss*, Horticultural Department	22,000

This shows that the only principle upon which the Water Department is chargeable with the insolvency of the company is that it is to be held responsible for sustaining and making good the losses in all the other operations of the company, particularly in the Horticultural Department. This is not mere jest.

For in this same document, Record, p. 548, it was said, that "the Water Department, it is believed, will soon make a better showing as a result of a complete overhauling of the basis of its administration."

This presaged the crusade against irrigators which was begun early the January following, in *Lanning* vs. *Osborne*, a crusade of which this appeal is the latest stage.

Again, the charge that the water rates have caused the financial troubles of the company, is refuted by the letter of August 15th, 1897, record, pp. 462-467. That letter

shows in detail what caused the company's trouble, but never once suggests that the water rates that had been prevailing, were any part of the trouble. The only thing said in the letter about water matters is as follows:

"The company was further crippled by the withdrawal of the Santa Fe Railway from National City, *which took away a large part of the income from its water system*, and seriously crippled the company in all its other operations."

Record, p. 465.

Is it credible that if the water rates in 1895 had been so low as not to yield proper compensation, something would not have been said about it in this elaborate expose of the financial troubles of the Kansas corporation?

We pit this letter against the claim of counsel that the water rates caused the insolvency of the company, the appointment of a receiver, and a forced sale of its property.

Thus, from three most deliberate and formal statements made by the most responsible representatives of both the companies, there is negatived the charge that the ordinance rates will not enable the company to realize any profit. We do no think that the new heads of account made up with a view to the litigation with the consumers, and to absorb the profits from the Water System carried on the books of the company up to the eve of that litigation, should militate against this evidence.

The fact remains that the water system, and that alone, —not the railway, nor the real estate, nor the horticultural department, nor the hotel—was exploited, and truly so, as the one trump and paying investment of the company.

V.

THE BOARD IN ADOPTING THE BASIS OF THE ORDINANCE IN QUESTION, IMPROPERLY CHARGED UPON THE WATER CONSUMERS AS EXPENSES, THE AMOUNT OF THE PUBLIC TAXES OF THE CORPORATION, THE SALARY OF ITS ATTORNEYS, THE EXPENSES OF ITS BOSTON OFFICE, AND A DISPROPORTIONATE PART OF THE SALARY OF ITS ENGINEER.

We now propose to take up the conclusions of the board, as set forth in the formal paper signed by its members, and as summarized in the memorandum in evidence (Record, pp. 73-75) so far as not already considered, and to compare them with the evidence, to ascertain whether the board has in any way treated this corporation otherwise than most liberally.

The board's estimate of the value of the system at $350,000, has already been discussed, and, we think, shown to be unimpeachable from the side of the corporation; that impeachment, especially in view of the prolonged breakdown of the water supply and the consequent impairment of the value of the service of the system, would far more properly come from the other side—that of the patient and much enduring public, who faithfully pay, and have paid, the rates, water or no water, and even whilst the corporation caused itself to be enjoined from supplying the water; and who, after the supply of the appropriated water to which the ordinance applies, had been exhausted, paid and still pay, in addition to the continued ordinance rates, the full price for developing a new supply, partial and insufficient from natural conditions.

The board's estimate of the annual irrigation duty, that

is, what it ought to supply if its service capacity were commensurate with the size of the system, outside of National City, at 6,080 acres, has been shown to be supported by the evidence before the board.

And it was shown that, considering the excessive size of the great mains, the capacity of which exceeds a supply for 20,000 acres, and that the company had spread its pipe system over 13,000 acres, and that the water supply at its best was disproportionately small as compared with the system of works, and during the life of this ordinance has for the most part failed, and now fails altogether, the adoption of this estimate of the acreage duty as a basis for arriving at an acreage rate, was abundantly fair, to say the least, to the company; it apportioned the burden of the revenue to be raised from irrigation upon much less than one-half the number of acres the pipe lines were built and extended to supply, thus making the acreage rate proportionately higher.

We have also shown that in carrying out the principle of apportionment so adopted, the board overlooked, to the advantage of the company, and to the disadvantage of the consumers, the whole returns from domestic rates under the ordinance outside of National City.

It was further shown that the annual repairs contemplated by the statute, cover the gradual replacements required, and that the demand for the "depreciation" sinking fund is illegal.

We wish now to take up the allowances made by the board for the annual expenses for repairs, operation and management. We submit that they are excessive, and that some important items of them are wrong in principle;

and that a very considerable proportion of the whole should be considered as being under this ordinance, in fact, an addition to the net revenue, under the cloak of expenses.

As the evidence stood before the board, the year 1896 was the last year before the hearing for which a full annual statement was contained in the Exhibit 1 (Record, p. 542).

The claim for $14,955.43 made by the corporation for 1896, included the items as hereinbefore stated (page 131 *supra*), from which we omitted the items of interest on bonds and under heading "depreciation."

The claim for such "expenses" for the year 1897 was in part prospectively estimated. But the principle followed in the statement for that year is the same as for the year 1896. The board followed the statement submitted by the company for 1897, as the nearest in date to the fixing of rates, except that it modified one item, as here after shown.

We state in parallel form, the amounts allowed by the board and the corresponding amounts claimed in the company's Exhibit 1, for 1897. (Record, pp. 75, 542.)

ALLOWED BY BOARD, 1897.		CLAIMED BY COMPANY, 1897.
General expenses,	$3,712.14	$3,712.14
Legal expenses .	1,491.62	1,491.62
Water Dep't ex .	3,426.90	3,426.90
Insurance ex. . .	8.00	8.00
Office expenses .	1,532.68	2,000.00
Taxes	3,270,66	3,270.66
Footing . . .	$13,442.00	$13,909.32

Thus, in the item of "office" expenses, the board cut down the company's claim for the item of $2,000.00 to extent of $467.32, and allowed everything else.

The testimony before the board bearing on these "expenses" was more especially directed to the statement submitted for 1896, copied above as the completed year nearest the time of the hearing.

As shown by the testimony of Mr. Boal before the board, already referred to, in explaining the heads of these claims for expenses, the heading:

"*General expenses*", covered the *salaries or wages of pipe repairs, the material used in repairing pipe, cost of teams used by those repairers and the keep of those teams,*" Also the *expenses of maintaining a keeper* at the dam and *cleaning the reservoir* from year to year; also the REPLACEMENTS of pipe during the year. So that this heading covers all the actual outlay of the company for repairs and operation of its water system outside of salary of engineer, superintendent and office management. (Record, p. 346.)

Thus, out of a total of $14,955.43, claimed as the actual expenses for 1896, *only* $5,000.71 was the actual outlay of the company during that year for the keeping in repair and the physical operation of its system—covering the cost of all labor, teams, material for replacements and otherwise, and the wages of the keeper of the dam. The remainder, to-wit: $9,946.53, of these "expenses", is made up otherwise. Of this sum $3,426.90 is attributed to the "Water Department", and $2,000.00 to "Office Expenses"; these two items aggregate the sum of $5,426.90.

This sum of $5,426.90 is made up as follows:

Of entire salary of Savage as engineer	$1,800.00
Of one-fourth general manager's salary . . .	600.00
Of one-fifth assistant treasurer's salary	300.00
Of Boston office expenses	1,100.00
Of one-half bookkeeper's salary	500.00
Miscellaneous	1,126.90
Total	$5,426.90

(Record, pp. 349-351.)

In this way the indoor expenses of managing this system, including the engineer's salary, and not including the attorney's salary, exceeded the whole out-door expense of repairs, replacements and actual operation by $426.00 for the year 1896. And, exclusive of Mr. Savage's salary and attorneys' fees, amounts to $3,503.02. Mr. Savage is the engineer of the company, not only for its water department, but for its railway, land and lot department. It would seem that in allowing the company's claim for his whole salary as a charge to the water department, the board was sufficiently liberal to the land and railway departments of its business. We submit, that if one-half of his salary had been charged to the water department it would have been sufficient.

As to the portions of the general manager's, assistant treasurer's and bookkeeper's salaries claimed as expenses, the board allowed the whole; so, also, the miscellaneous amount of $1,126.90 which is apparently ample to cover postage, necessary printing, books, and the like; so, also, the item of insurance.

The item of Boston office expenses of $1,100.00 was the one in respect of which in 1897, the board made a deduc-

tion of $467.32. Upon the explanations given of the nature of the services of that office to the water department (Record, pp. 349-350), no reason appears to show that the board was not justified in rejecting that much at least of that claim; we think it ought all to have been rejected.

Indeed, if the expenses of the Boston office for this local company in its several departments, run up to $26,000 per annum, as indicated in the statement of Mr. Boal (Record, p. 350), this alone is ample reason for the insolvency of these companies past, present and to come.

Thus the board allowed substantially everything claimed for the statutory expense of *repairs, operation and management* upon a liberal scale.

Under the theory upon which the Board passed its ordinance, to-wit: That it should disregard water rights and fix rates to yield net revenue of six per cent. on the value of the system, taxes on the system were improperly allowed as expenses chargeable upon the consumers.

As already shown, the Board of Supervisors, at the time of the passage of the ordinance, deemed it to be its duty, under the decision of the Circuit Court, to disregard all water rights and fix rates to yield to the company six per cent. upon the estimated value of the system. This is the theory of the bill.

We come now to consider the propriety of the item of taxes on the water system as related to this theory. The amount of these for the year 1896 was $3,444.20; for 1897 $3,270.60. This comprises the taxes on the whole system, the part in use and the part idle.

The Board allowed the whole tax as part of the expenses of "repairs, operation and management."

We challenge the propriety of this under the theory of the bill, in whole and in part, under any construction of the expenses defined by the statute, or under any principle of law. Why should the consumers pay the company's taxes, and the statutory net revenue besides?

The law does not so provide; justice does not so require. We do not think that the Board can ever be justified in taking the company's taxes into consideration, in adopting a rate of net revenue within the statutory limits; that is to say, they should not fix the rate of net revenue at six or any higher per cent., on the ground that they have included taxes on the system in estimating expenses, and this because when the statute fixed a minimum rate of net revenue, it did that apart and distinct from the expenses, the character of which is limited and defined. Taxes by no stretch can be made expenses of *repairs*, or of *operation* or *management*.

We can see how in cases where the law prescribes to the rate-fixing body no minimum net revenue on the value of the system, and the question is whether the rates fixed allow *any* returns to the corporation above its necessary outgo, it is proper to count taxes in with all other proper expenses. But not so when the statute fixes a minimum net revenue. When the consumers pay this, it is unreasonable and unlawful to make them pay the company's taxes; it would be as reasonable to make the company pay the taxes on the consumer's lands, on the ground that the company had the benefit of acreage rates from them.

Therefore, we say that upon the theory upon which the

Board proceeded it erred in allowing the taxes on the water system in the sum of $3,270.66; and that sum should be considered as so much added to the six per cent. net revenue.

Upon what principle alone, the charge of Taxes as expenses is justifiable.

This charge upon the consumers of any part of the taxes upon the system is justifiable only upon the principle that their water rights represent interest, in the system, which are real property, that these water rights are freehold easements, which reach the dignity of beneficial interests in the physical estate more fully defined even than an ordinary easement, because titles to parts of the sole use to which the whole property is dedicated.

If these water rights are to be respected, as we contend they are entitled to be under the law, then we concede that each owner of an irrigating easement should pay his due proportion of the taxes on the system, as being taxes upon his own property.

But we contend that this is not so, upon the theory on which the bill in this case is framed, to-wit, that the corporation owns the system and that the consumers have no property interests in it.

The salary of Attorneys was improperly allowed as part of the Annual Expenses.

. It seems that the annual salary of the firm of attorneys employed by this corporation, compounded as it is, of a water, a railway and a land department, is $2,400.00, half of which was claimed by the corporation and allowed by the Board, as part of the annual expenses of the water system, charged upon the consumers.

(Record, pp. 346-348.)

When the nature of the services rendered for this salary is examined, it is found to have no relation to the protection or defense of the system or its water supply, nor to any benefit to the consumers who are asked to pay their salary; but it appears from the evidence that the entire "services" of the attorneys were confined to the institution of suits by the company against its consumers within and without National city (Record, p. 347), in which ought to be included the suit in which the water supply was cut off for nearly three months, from September to December, 1898; and the advice leading to the institution of mandamus suits, to which would-be consumers are to be driven by the demand for the price of water rights of the kind that are valuable only as they yield "bonuses" to the company. (Record, p. 358.)

It is the law of this state that aside from a contract by a defendant to pay attorney's fees, no such fees can be recovered against him, even where the plaintiff succeeds.

Code of Civil Procedure, Section 1021:

"The measure and mode of compensation of attorneys and counselors at law is left to the agreement, expressed or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

In the case of *San Diego Land and Town Company* vs. *National City* the company failed in this court and in the Supreme Court. But the attorney's salary, and some, at least, of the costs in that case, were charged up to the consumers as expenses.

In the case of *Lanning* vs. *Osborne*, in this Court, which was a suit to enforce an increase of irrigation rates from $3.50 to $7.00 until the Board should fix rates, it

is true the plaintiff succeeded in this court and in the Supreme Court, but the question of the reasonableness of the increase was expressly left open by this Court and the court below, for the action of the board. The board have acted; and so far as its determination is concerned, it has found the company's demand for an increase unreasonable, and, as we think, upon impregnable grounds. The defendants in that case paid their costs. But why should they pay the salary of the attorney of the opposing party?

In a more general view, is it a proper thing for the public to insist upon controlling the rates between companies and consumers, and then permit the fastening upon the irrigating communities of permanent salaried attorneys, without regard to whether they bestow any benefit upon the communities?

That such a policy leads to promoting strife and litigation between companies and consumers, we think the present case and the evidence fully illustrate.

If the law intended that the public, consisting of consumers, should pay salaries of permanent salaried attorneys for water companies, it ought to say so; for they prove the most expensive luxuries the companies can indulge in; and the most injurious to companies and consumers.

We are not to be understood as claiming for one moment, that where the corporation employs attorneys to protect its water rights, to acquire needed property for the system, and generally for any purpose in the interests of the water supply and for the benefit of its consumers, that the reasonable compensation is not a proper expense.

What we submit is, that it is against the general and statutory public policy to make an irrigating community

pay the salary of attorneys, the sole use made of whom, as shown by the evidence, is to harass the community with unnecessary and most injurious litigation and demands.

This $1,200.00 should be treated as so much added to the net revenue, in judging whether this ordinance is obnoxious to the charge of being in the constitutional sense unreasonable.

Here, then, are the following items that are granted by this ordinance, which, if this case were under review for error, should be esteemed as going to swell the net revenue above the six per cent. on the value of the system as allowed by the Board, to-wit:

Domestic rates outside of National City, (we take the year 1896 as more fully representing the returns)	$4,545.13
Taxes on water system	3,270.66
Attorney's salary	1,200.00
One-half of Engineer's	900.00
Boston office	1,100.00
Total	$11,015.79

Here is upwards of $11,000 that should in justice be considered as part of the net revenue of this corporation under this ordinance in passing judgment on the attack made on the ordinance as being unconstitutional. A net revenue of $11,000, represents six per cent. on a capital of $180,000 in round numbers. So that this corporation in fact, under the rates in question, has the benefit of a net revenue of six per cent. per annum on over $530,000, which is more than twice what it paid for the system.

It is submitted that here is further reason for the con-

clusion, that this case is very far from a proper one for judicial interference with rates established by legislative sanction.

VI.

THE BOARD OF SUPERVISORS, THE MEMBERS OF WHICH ARE THE APPELLEES HEREIN, REPRESENTS THE PUBLIC; AND IN ITS PUBLIC AND REPRESENTATIVE CAPACITY, IT WAS THE ONLY NECESSARY DEFENDANT; AND THERE COULD BE NO DECREE HEREIN PRO CONFESSO AS CLAIMED BY APPELLANT, WHERE ISSUE REMAINED JOINED ON ITS ANSWER.

The appellants joined as defendants to the bill in this action, the members of the Board of Supervisors and the persons who signed the petition to the Board, as provided in Section 3 of the Act of 1885.

Counsel now contend that it was neither necessary nor proper for it to have made the members of the board defendants; that the petitioners were the only proper defendants, and that as they did not answer, although the members of the board did, a decree upon the bill as confessed should have been entered.

That it was not so entered, is the burden of the first three assignments of error.

We submit that the opinion of the court below on this point, and the authorities cited in support of it, constitute a complete answer to this contention of the appellant. (Record, p. 62.)

Counsel, however, contend that the opinion is erroneous and that the cases cited in support of it have no application.

The grounds upon which it is attempted to support this contention resolve themselves into the following propositions:

That the Board of Supervisors in making the ordinance acted as a court.

That the qualified petitioners were the plaintiffs.

That the corporation was the defendant.

That the notice of the proceeding ran to the corporation and no one else.

That the ordinance was simply a judgment in favor of the petitioners as the sole parties plaintiff in interest, and affected no one but such petitioners and the corporation.

Therefore (so it is insisted), upon the failure of the petioners to answer the bill, the judgment, to-wit: the ordinance, must be set aside as upon the bill taken *pro confesso.*

Counsel make another statement in the following language:

"In this case, the petition was filed by twenty-five of the citizens and tax-payers of the County of San Diego, who were not, nor was any one of them, a consumer or user of water from the system of appellant."

Now, if the former propositions are true, then taken together with the statement just quoted, it would follow that the ordinance did not affect the consumers nor the relations which existed between them and the company prior to the filing of the bill; did not affect the seven dollar acreage rate established by the corporation for its consumers and upheld by this Court in *Osborne* vs. *Land and Town Company*, 178 U. S., 22; the ordinance did not apply to the rate-payers and had no practical operation to be

avoided. If that were true, the case is about a mere barren abstraction and there is no equity in the bill.

If, as counsel contend, an ordinance fixing rates fixes them only for the handful of inhabitants and taxpayers who happen to sign the petition to the board, and if, in the case in hand, not one of such petitioners was a water consumer or rate-payer—then, if we may presume to suggest, the judicious advice of the attorneys whose salaries are paid by the consumers, to their corporation, would have been that it ignore and disregard the ordinance; not that it file this bill and bring up this voluminous record and charge the expense of it in any event to the consumers, to no practical purpose or end.

But manifestly the basis of the bill of complaint is that the ordinance does operate between the corporation and all the consumers of water and rate-payers, for it is alleged that "the rates fixed by said Board of Supervisors are unreasonable and unjust and will return your Orator no revenue whatever, etc."; and that, "the enforcement of said rates will amount to the taking of your Orator's property without or any just compensation, and a confiscation thereof." Such results could not (except in the early part of the brief for appellant) be attributed to the operation of an ordinance which operates only between the corporation and the petitioners.

And a cursory glance at the Act of 1885 (App.) is sufficient to show that such a rate ordinance operates on the whole public who are, or may at any time during the life of the ordinance become, users of water under the system, saving due regard for vested contract rights.

We may spare the Court any extended analysis of the statute; for from its opening declaration of the public use

(Section 1), and the provision that the publication of the notice of the hearing before the board upon the fixing of rates shall impart notice to the corporation and to all persons interested in the matter (Section 3),—to its closing provisions against the collection of any rate in excess of that fixed (Section 9), and that any such corporation shall be obliged to sell, rent or distribute at the rates fixed to the inhabitants of the county to the extent of its actual supply, (Section 10),—all go to show that the rates when fixed with proper regard to vested rights, control the whole water supply to all who at any time use it while the rates are in force.

Clearly, no twenty-five or thirty petitioners represent the public in a suit brought to set aside the ordinance; they could not, as counsel argue, be permitted to stipulate for a decree *pro confesso*, or authorize one by default, setting aside an ordinance of this public character.

As we understand it, the Supreme Court of the United States has in numerous instances sanctioned, and in others expressly advised, the practice of making the public bodies to which the legislature had delegated the power to fix rates, such as railway commissioners, city or town councils, boards of transportation and boards of supervisors, the parties defendant to suits attacking rates fixed by them on allegations that they operate unjustly and unreasonably in the constitutional sense. And we understand that the court has disapproved the practice of deciding a question affecting rates to the public, with only individuals before it.

The reason for this is assigned in the opinion of the Court by Mr. Justice Shiras in *St. Louis & San Francisco* vs. *Gill*, 156 U. S., 649, 666, near bottom, to the effect

that a private person as a party "*in no adequate sense represented the public.*" In the same opinion, p. 659, speaking of the case of the *Chicago, Milkaukee & St. Paul Railway Company* vs. *Minnesota*, 134 U. S., 418, a rate case, it is said:

"But it will be observed that the State *was represented by the commission*, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer."

Then (156 U. S., 649, 659-660) there is quoted with approval the following, from the concurring opinion of Mr. Justice Miller, 134 U. S., 418, 460:

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by the commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of the Court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done *it is not competent for each individual* having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, *to raise a contest in the courts over the questions which ought to be settled in this general* and conclusive method."

And pursuing the subject, Mr. Justice Shiras further said (156 U. S., 649, 666):

"Sometimes in acting on this subject the State Legislatures have created commissions or boards of public works,

with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity, or some equivalent proceeding, wherein the rights *of the public as well as those of the company complaining*, can be protected.

"But there are other cases, and the present is one, where the legislature chose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, *because there is no public functionary or commission which can be made to respond*, and, therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defence to an action for the collection of the penalties."

Chicago, etc., Railway Co. vs. *Wellman*, 143 U. S., 339, 344, 346.

We submit that where, as here, there is a Board of Supervisors which, to use the language ot Mr. Justice Shiras, "*can be made to respond*", and does respond, the persons who signed the original petition to the board to fix rates are distinctly unnecessary parties, and their default for want of answer is immaterial.

In the following cases State Railway Commissioners were made defendants and treated by the court as competently representing the public:

Reid vs. *Chicago, etc., Railway Co.*, 94 U. S., 164 (1876);

Stone vs. *Farmers' Loan and Trust Company*, 116 U. S., 307 (1886);

Stone vs. *Illinois Central Railroad Company*, 116 U. S., 347 (1886);

Stone vs. *New Orleans & Northwestern Railroad Co.*, 116 U. S., 353 (1886);

Georgia Banking Company vs. *Smith*, 128 U. S., 174 (1888);

Reagan vs. *Farmers' Loan and Trust Company*, 154 U. S., 362 (1894).

In the case last cited, it was said by Mr. Justice Brewer (*Ibid*, p. 390):

"Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers * *."

And on p. 394, *ibid:*

"Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislature."

And yet the question of rates was determined in that case with only the commission before the court as represeting the shippers and carriers.

In *Smyth* vs. *Ames*, 169 U. S., 466 (1897), the State Board of Transportation and the secretaries thereof, were made the principal defendants.

It *Chicago, Milwaukee & St. Paul Railway Co.* vs. *Tompkins, et al.*, 176 U. S., 167 (1900), the defendants were the Board of Railroad Commissioners of the State of South Dakota.

In *San Diego Land and Town Co.* vs. *City of National City*, 174 U. S., 739, 74 Fed. Rep. 79, the defendants were the municipality of National City and its Board of Trustees.

In all these cases it may be assumed that the public officers or boards of the State appeared by the attorneys-general of the State, or counsel employed by the State;

and the city authorities by the law officers of the city, or counsel employed by the city; in fact a number of cases above cited, show the appearance in railway rate cases of the attorneys-general of their respective States before the Supreme Court. (154 U. S., 362, 370; 169 U. S., 467, 478.)

It *Cotting* vs. *Kansas City Stock Yards, et al.*, 183 U. S., 79, the attorney-general of the State of Kansas was made a party defendant and was the only party before the court who represented the public interest. So here the district attorney of the county, Mr. Sweet, appeared for the board during his term of office; and his successor, Mr. T. L. Lewis, now appears.

The appearance of the district attorney is not for the members of the board as individuals, but as a public body, representing the public. And where the action of the board has overlooked to any extent considerations of the public interest, counsel have not hesitated to point it out. For the counsel who appear for the board are charged with a duty to the general public.

For, to quote the language of the Circuit Court in *Lanning* vs. *Osborne*, 76 Fed. Rep., 319, 339:

"The complainant, being in charge of a public use, in the management of it, does not act for the defendants alone, but to the extent of the capacity of the system to furnish water *for all of the public who are or may be* situated within its reach."

CONCLUSION.

The complainant disproved by Supervisor Cherry, who was the only one of the board whom the complainant saw fit to call, the allegations of the bill charging that the

board did not find or determine the value of the plaintiff's plant, system and property actually used and useful to the appropriation and furnishing of water; also disproved the allegations of the bill charging that the board did not find or determine the annual cost of repairs, management and operation of such works, and disproved the allegations of the bill charging that the board, in fixing rates did not adjust or attempt to adjust the same so as that the net annual receipts and profits would be not less than six per cent. on the value of the complainant's water works actually used and useful to the furnishing of water to consumers.

The complainant likewise, by the same witness, disproved the charges of the bill, that the board, instead of fixing rates so as to return to complainant a net profit of not less than six per cent. upon the value of its plant, acted upon the protest laid before them and the proof thereunder, and that the board, in pursuance of such protest, so fixed rates by said ordinance as to provide for the expenses of operating and managing its said plant by complainant, and so as to return to complainant no profit whatever, or in any way provide for the depreciation of the plant.

The proof shows beyond question that the board discarded the whole theory of the protest and followed out literally the method prescribed by the statute construed by the Circuit Court as disregarding claims of water-rights.

In other words, the Board of Supervisors, followed throughout, and in all things, the principles laid down by the Circuit Court in the case of *Lanning* vs. *Osborne*, 76 Fed. Rep., 39.

Counsel might have readily learned this much by inquiring of the board, or any of its members, at any time before filing their bill and making charges against the board, which they are obliged to abandon. For their brief changes base, and substitutes for charges against the board, the equally unfounded charges which are not even pleaded in their bill, that the board were victims of deception practiced by the consumers. So completely do these charges against the board fail, that they are now contending (Brief, p. 10) that the members of the board were not necessary, and even that they were not proper parties defendant.

So complainant upon any theory of the statute, has no ground of complaint against the *method* pursued by the board. And that disposes of so much of the bill.

The only other material allegations of the bill, relate to the manner in which the board pursued that method and are (Record, p. 12); that the rates fixed by said Board of Supervisors are unreasonable and unjust and will return no revenue whatever; that if complainant is compelled to furnish water at the rates so fixed, it can only do so at a continued actual loss to it, and that the enforcement of said rates will amount to taking complainant's property without just or any compensation, and a confiscation thereof.

This is the charge with the discussion of which this brief opened and with which it is chiefly concerned.

We most respectfully submit that the proofs in this case show it to be absolutely without support or foundation; that the board weighed all the evidence with a most open mind to all just claims of the corporation; that if the board erred, it was in conceding too much to its

claims; and that the proofs barely justify the fixing of so high an acreage rate as $3.50 per acre per annum in connection with the other rates established by the ordinance, even upon the theory that water-rights were to be disregarded; and that it seems quite possible that the board in fixing upon so high a rate (seeing that in order to reach it they allowed excessive expenses, and did not allow in their calculation for the returns from domestic rates under their ordinance) was influenced by the fact as appeared, that the public had acquiesced in the same rate when formerly established by the corporation.

We have hereinbefore submitted that the ownership by the proprietors of land under this system, of their irrigating easements, is an element which, in the problem of fixing rates by public authority, cannot be disregarded,—now since the decision of the Supreme Court, followed by the Circuit Court of Appeals, has established the validity of such rights as a rule of property; that the owners of these water-rights have constitutional rights to be protected, as well as the company, in the adjustment of the annual rates; and that on this appeal, in which appellant seeks a reversal of the decree of the Circuit Court on the ground that the ordinance sustained by it unlawfully deprives the appellant of its property by placing on it too low a valuation as a basis for rates, the owners of water-rights have the countervailing right to have their interests in the system considered, because their interests are correlated to those of appellant, and because the total value of the system is distributed between the company and the owners of irrigation easements in that system.

It will not have escaped the attention of the Court that the controversy over the question of the relation of water-

rights to annual rates subsequently demanded, has been sore from the beginning of the litigation between these water companies and the owners of irrigation rights under their system.

We hope, therefore, for an indication of the opinion of the Court upon this subject, at least to the extent of determining the general principle as to whether such freehold easements are an element not to be disregarded in the problem of fixing rates, when that problem is committed for solution to a public body to be settled upon consideration of "what, under all circumstances, is such compensation for the use of its property, as will be just to it and to the public." (164 U. S., 578, 597, 598; 174 U. S., 757.)

Upon review of the whole case as it was presented before the board; and as light has been thrown upon its merits since, by the additional evidence in the Circuit Court; and when it is called to mind that the water supply —the *sine qua non* to the value of a water system and its service—has dwindled and utterly failed; that the menace of this failure overhangs the future; that notwithstanding that fact the public has faithfully paid these ordinance rates; that the consumers have suffered the burden of loss, deprivation and disaster; that they have paid, additional to the ordinance rates, the full price for developing a new partial water supply in place of that which failed; that this ordinance rate is a term of the contracts under which this new development has been done—when these things are considered, speaking with all candor, it seems incredible that this corporation should seek to set aside this ordinance and enforce either retroactively or prospectively, the $7.00 acreage rate under the operation of the decree in *Lanning* vs. *Osborne*.

We most respectfully submit that if this Court were exercising a jurisdiction to fix rates, or were sitting on an appeal from the board, it could not be moved under the proofs to increase the valuation of the system, or to fix higher rates than were fixed by the board, by this ordinance, as an entirety.

But, inasmuch as the function of the Court is limited to deciding whether this legislative act of the Board of Supervisors is unconstitutional under the rules and limitations of judicial interference, so forcibly and emphatically stated in the opinion of Mr. Justice Harlan in *San Diego Land and Town Co.* vs. *National City*, 174 U. S., 753-4, *supra*, and followed in the opinion of the Circuit Court (Record, p. 63), we finally submit, with all deference, that what the company prays for is legally impossible; and that the decree of the Circuit Court, dismissing the bill, should be affirmed.

T. L. LEWIS,
District Attorney, San Diego County, and

A. HAINES,
Deputy District Attorney,
Attorneys for Appellees.

APPENDIX.

ACT

Approved April 5, 1876.

(Civil Code, Sec. 552.) Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.

ACT

Approved March 12, 1885.

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several Boards of Supervisors thereof, in the manner prescribed in this Act.

"Sec. 2. The several Boards of Supervisors of this State, on petition and notice as provided in Section Three of this Act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association or corporation, having or to have appropriated water for sale, rental or distribution, in each of such counties, may and shall sell, rent or distribute the same.

"Sec. 3. Whenever a petition of not less than twenty-five inhabitants, who are tax payers of any county of this State, shall, in writing, petition the Board of Supervisors thereof, to be filed with the Clerk of said Board, to regulate and control the rates and compensation to be collected by any person, company, association or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons,

companies, associations, or corporations, or any one or more of them, whose water rates are therein petitioned to be regulated or controlled, the Clerk of such Board shall immediately cause such petition, together with a notice of the time and place of hearing thereof, to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said Board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said Board, not less than thirty days after the first publication, or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations, mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment.

"Sec. 4. At the hearing of said petition the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties.

"Sec. 5. In the regulation and control of such water rates, for each of such persons, companies, associations, and corporations, such Board of Supervisors may establish different rates at which water may and shall be sold, rented, or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to said persons, companies, associa-

tions, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements or other permanent improvements of such water rights or water works shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants; *and each such Board of Supervisors shall designate what proportion of the rates so fixed shall be for the said annual reasonable expenses of each of such persons, companies, associations or corporations, and what proportion of the rates so fixed shall be for the said net annual receipts and profits to such persons, companies, associations or corporations.* The said rates, when so fixed by such Board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such Board of Supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such Board of Supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof.

"Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State, the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, asso-

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NOTE—The matter in italics was inserted by the Amendment approved February 28, 1901.

ciations, or corporations, the rates and compensations of whose appropriated waters *have already been fixed and regulated and are still subject to such regulation by any Board of Supervisors of this State*, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established; and may, upon the petition of such inhabitants but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this Act.

"Sec. 7. Each Board of Supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

"Sec. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as *fixed and established* by such person, company, association, or *corporation, as provided in this Act.*

"Sec. 9. If any person, company, association, or corporation whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit.

Sec. 10. Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town therein), appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money, of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated

and fixed therefor, as in this Act provided, whether so fixed by the Board of Supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation, for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

"Sec. 11. Whenever any person, company, association, or corporation, shall have acquired the right to appropriated water, or shall have acquired the right to appropriate such water in this State, such person, company, association, or corporation, may proceed to condemn the lands and premises necessary to such right of way, under the provisions of Title Seven, of Part Third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

"Sec. 11½. Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in Section Two of this Act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract." (Amendment approved, March 2, 1897.)

"Sec. 12. This Act shall take effect and be in force from and after its passage."

SERVITUDES.

Sec. 801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;

8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;

9. *The right of receiving water from* or discharging the same upon land;

10. The right of flooding land;

11. *The right of having water flow without dimunition or disturbance of any kind;*

12. * * * * * etc., etc.

Sec. 802. The following burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right to a pasture, and of fishing and taking game;
2. The right of a seat in church;
3. The right of burial;
4. The right of taking rents and tolls;
6. The right of taking water, wood, minerals, or other things.

Sec. 803. The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Sec. 804. A servitude can be created only by one who has a vested estate in the servient tenement.

Sec. 805. A servitude thereon cannot be held by the owner of the servient tenement.

Sec. 806. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Sec. 807. In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

Sec. 808. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Sec. 809. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

Sec. 810. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one lawfully possessed thereof, though a servitude exists thereon in favor of the public.

Sec. 811. A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;
2. By the destruction of the servient tenement;

3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,

4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

EFFECT OF TRANSFER.

Sec. 1104. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.